

87-1507

No.

Supreme Court, U.S.  
FILED

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JOSEPH F. SPANIOLO, JR.  
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

David Yashon, M.D.,

Petitioner,

v.

William E. Hunt, M.D., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

Petitioner David Yashon, M.D., is a licensed doctor of medicine whose speciality is neurosurgery. For a number of years prior to 1981, and in furtherance of his chosen career as a teacher of neurosurgery, Petitioner was employed as a tenured full professor of neurosurgery at The Ohio - State University College of Medicine. Neurosurgery is taught primarily by a doctor having patients in a hospital, and by medical students, interns and residents observing the doctor treating such patients. Therefore, for a number of years prior to 1981, and in conjunction with his position as a professor of neurosurgery at The Ohio State University College of Medicine, Petitioner had medical staff privileges



at The University Hospitals, which is the primary teaching hospital of the College of Medicine.

In 1981, Respondents refused to reappoint Petitioner to the medical staff of The University Hospitals. The parties stipulated and the district court in this action found that Petitioner's expectation of being reappointed to the medical staff was a property interest protected by the due process clause of the fourteenth amendment to the United States Constitution, and that therefore he was entitled to a due process hearing with respect to the issue of his reappointment to the medical staff.

The refusal of Respondents to reappoint Petitioner to the medical staff resulted from a meeting of the



Medical Staff Advisory Committee of The University Hospitals, at which meeting Respondent Larry C. Carey, M.D., Petitioner's division chairman and the chief accuser of Petitioner, was allowed to call thirteen witnesses to support his charges against Petitioner, but Petitioner was not allowed to call any witnesses in his own defense. All or virtually all of the charges utilized in 1981 to deny Petitioner reappointment to the medical staff were utilized in prior disciplinary proceedings against Petitioner, which, if successful, would have resulted in his removal from the medical staff. None of these prior disciplinary proceedings resulted in Petitioner's removal from the medical staff.



The decision of the Medical Staff Advisory Committee not to reappoint Petitioner to the medical staff was not supported by any statement or document setting forth the reasons for such decision or the evidence upon which such decision was based.

Therefore, the case presents to following questions:

(1) Did Petitioner have a right under the due process clause of the fourteenth amendment to the United States Constitution to call witnesses on his own behalf at a hearing to determine if he should be reappointed to the medical staff, or was he limited, as the court of appeals below held, to questioning the witnesses presented against him and to making statements in his own behalf?





(2) Did the due process clause require Respondents to state the reasons for their determination not to reappoint Petitioner to the medical staff and the evidence relied upon in reaching such determination?

(3) Did administrative res judicata prevent Respondents from utilizing in 1981 as grounds for not reappointing Petitioner to the medical staff grounds which had been utilized in the prior disciplinary proceedings?



PARTIES TO THE PROCEEDING

Petitioner: David Yashon, M.D.

Respondents: William E. Hunt, M.D.  
Manual Tzagournis, M.D.  
Ronald B. Berggren, M.D.  
Tennyson Williams, M.D.  
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Ian W. Gregory, M.D.  
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Chester Devenow  
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The Ohio State University  
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PETITION FOR A WRIT OF CERTIORARI  
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Petitioner David Yashon, M.D.  
("Petitioner"), hereby petitions for a  
writ of certiorari to review the  
opinion and judgment of the United  
States Court of Appeals for the Sixth  
Circuit rendered in this case on  
August 3, 1987.



### OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit which is at issue in this petition was rendered on August 3, 1987, and is reported at 825 F.2d 1016 (that decision is included in the Appendix to this petition, at Appendix pages 1 through 21; due to its length, the Appendix has been submitted as a separate document). That decision affirmed the Opinion And Order entered in this case by the United States District Court for the Southern District of Ohio, Eastern Division, on February 26, 1982; that Opinion And Order is unreported (that Opinion And



Order is included in the Appendix to this petition, at Appendix pages 22 through 96).

This case was reviewed two times by the Sixth Circuit between February 26, 1982 and the review which resulted in the August 3, 1987 decision and judgment of that court. In both of these prior reviews the Sixth Circuit vacated a judgment of the district court and remanded the case to that court for further proceedings. The issues involved in those two prior reviews by the Sixth Circuit are not involved in the present appeal. The two prior decisions of the Sixth Circuit in this case are reported at 696 F.2d 468 (1983) and 737 F.2d 547 (1984).



STATEMENT OF GROUNDS ON WHICH  
JURISDICTION OF THIS COURT  
IS INVOKED

The decision and judgment of the Sixth Circuit Court of Appeals at issue in this petition was filed on August 3, 1987. An Order overruling Petitioner's petition for rehearing in the Sixth Circuit was filed on September 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

Section 1 of the due process clause of the fourteenth amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or





property, without due process of law;..."

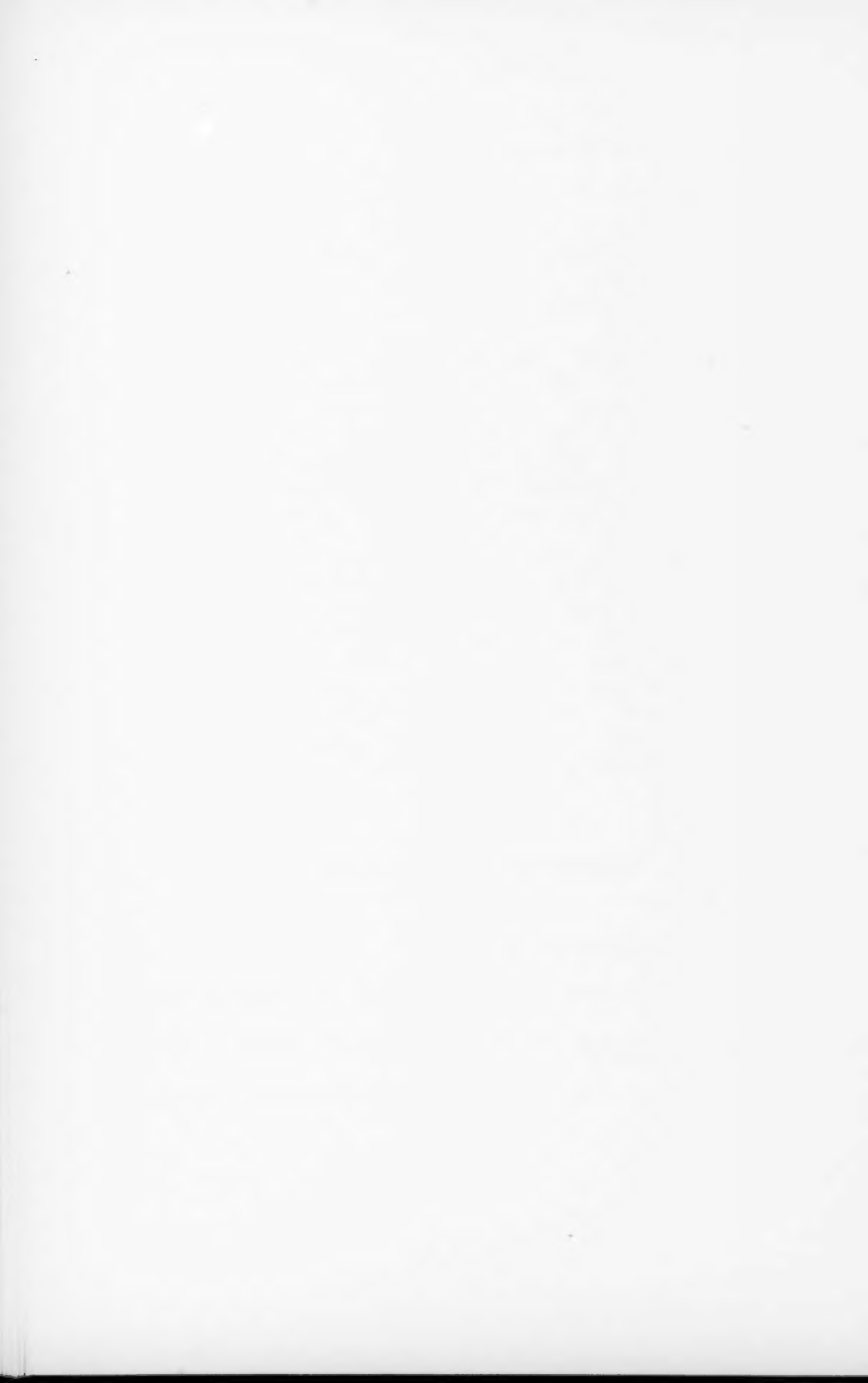
42 U.S.C. §1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

#### STATEMENT OF THE CASE

##### A. Statement Of Facts

Petitioner is a doctor of medicine duly licensed by the State of Ohio. In September of 1969, Petitioner was



appointed to the position of associate professor in the Department of Surgery of The Ohio State University College of Medicine. In 1972, Petitioner was granted tenure by The Ohio State University, and in 1974 he was elevated to the position of full professor of surgery in the Division of Neurological Surgery of the Department of Surgery. Respondent Larry C. Carey, M.D. ("Respondent Carey") is Chairman of the Department of Surgery. Respondent William E. Hunt, M.D. ("Respondent Hunt") is the Chairman of the Division of Neurological Surgery, a division within the Department of Surgery.

Petitioner was appointed to the medical staff of the University Hospitals in September of 1969, at the same time he was first appointed as a



member of the faculty of the College of Medicine. Since 1969, The Ohio State University has annually reappointed Petitioner to his position as part of the faculty of the College of Medicine. From 1969 until July 1, 1981, Petitioner had also routinely been reappointed annually to the medical staff. Prior to June of 1981, Petitioner submitted to Respondent Carey his application for annual reappointment to the medical staff. In June of 1981, Petitioner was informed that Respondent Carey had refused to submit Petitioner's application to the Medical Staff Administration Committee ("the MSAC"), the Committee of The University Hospitals charged with the responsibility for initially ruling on applications for reappointment to the



medical staff, and that therefore Petitioner would be removed from the medical staff effective July 1, 1981.

Respondent Carey's failure in 1981 to recommend Petitioner's application for reappointment to the medical staff was at least the fourth attempt by Respondent Carey to utilize procedures of The Ohio State University to curtail or terminate Petitioner's medical staff privileges. The first attempt was in May, 1978, when Respondent Carey initiated detenurization proceedings against Petitioner based on the allegation that Petitioner had included in a grant application the name of another faculty member of the College of Medicine, without that faculty member's authorization. If Petitioner had been detenurized, he would have





lost his medical staff privileges at The University Hospitals, because only members of the faculty of The Ohio State University College of Medicine are eligible for medical staff privileges at The University Hospitals. Pursuant to Section 3335-5-04(C)(2)(a) of the Ohio Administrative Code, the Dean of the College of Medicine was required to dismiss the detenurization charge "If no reasonable and adequate grounds are found to support the complaint,...." The detenurization complaint against Petitioner was dismissed by the Dean of the College of Medicine in September, 1978.

The second attempt started on October 27, 1979, when Respondent Carey wrote the Dean of the College of



Medicine to institute a proceeding to revoke Petitioner's medical staff privileges. The October 27, 1979 letter listed a number of charges against Petitioner; virtually all of the charges upon which Respondent Carey based his 1981 failure to recommend Petitioner's application for reappointment to the medical staff were the same charges utilized in the 1979 revocation proceeding. Pursuant to the then existing medical staff bylaws, a Grievance Committee of five physicians chosen at random from the medical staff was empaneled to determine the validity of the charges contained in the October 27, 1979 letter. The Grievance Committee requested that Respondents Carey and Hunt and Petitioner submit to it all pertinent written material



concerning these charges; in addition, the Committee interviewed these three individuals and others who had relevant information. After more than thirty hours of investigation and deliberations, the Grievance Committee issued a five-page written report. This report fully and completely exonerated Petitioner, stating, in part:

The Committee feels strongly that this issue has been a disruptive, harmful, and unnecessarily prolonged incident in the history of The Ohio State University Hospitals and within the Department of Surgery. Based upon the overwhelming evidence that exonerates Dr. Yashon, we are puzzled as to why it was not resolved earlier. It is apparent that if Dr. Carey had conducted an objective examination of the facts, he would have found that there was no validity to these charges. Dr. Carey and Dr. Hunt chose not to conduct an objective or impartial evaluation of the facts



which, at best, represents inept administration. There appears to have been a policy of deliberate harrassment of Dr. Yashon. This harrassment has been extremely harmful to Dr. Yashon's potential for an academic career, his image as a physician, and to the Division of Neurologic Surgery, the Department of Surgery, and to The Ohio State University Hospitals.

The unanimous recommendations of the Grievance Committee report included the recommendations that Petitioner's "rights, privileges, and responsibilities as a senior attending physician be fully restored" and that "the strongest possible administrative action be instituted to terminate the policy of harrassment of Dr. Yashon...."

Despite the report of the Grievance Committee and with no further investigation, the Associate Dean of the College of Medicine issued a





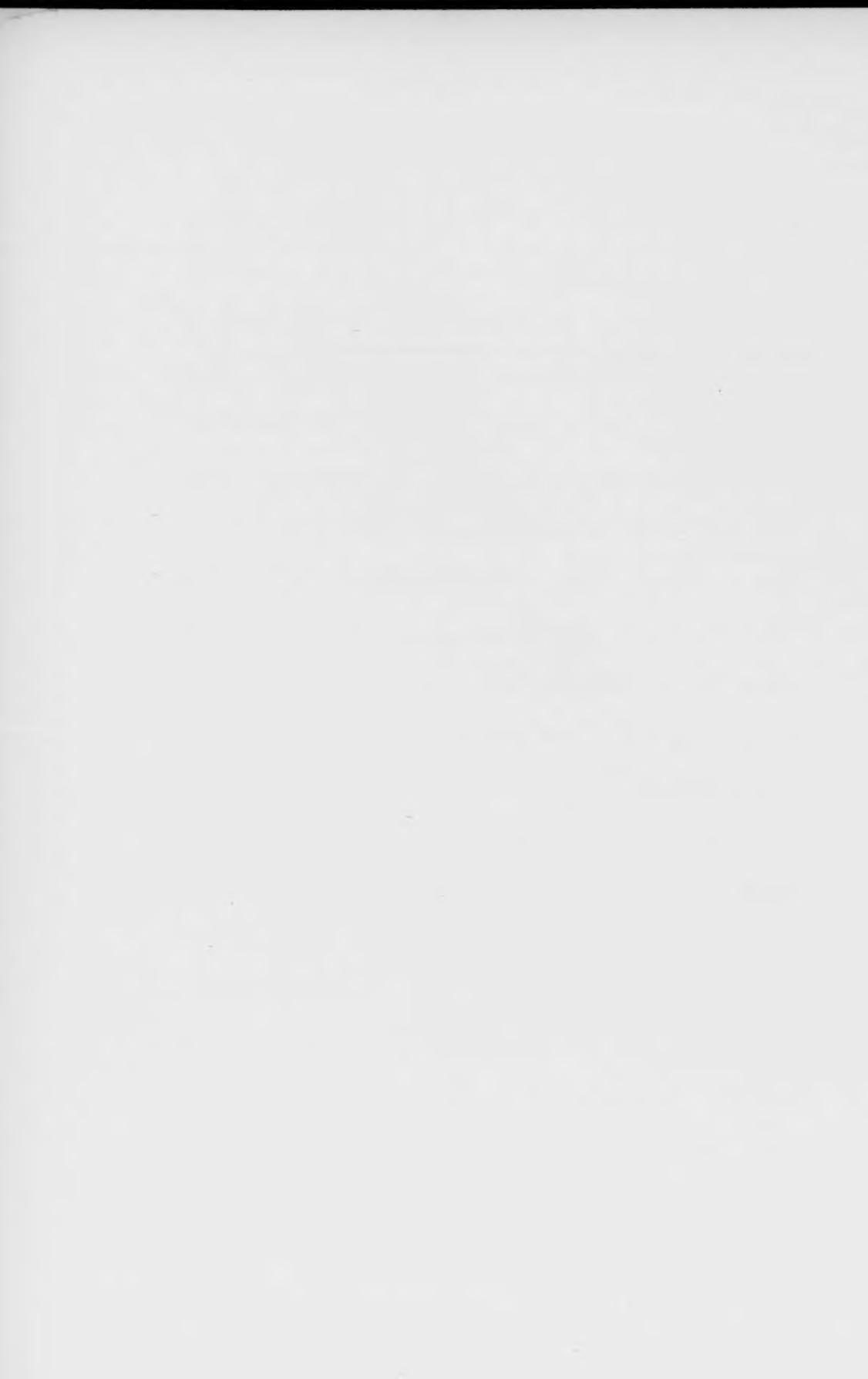
"strong reprimand" to Petitioner. However, the Associate Dean expressly stated that "In view of the conflicting recommendations and opinions available to me, I conclude that they [Respondent Carey's charges against Petitioner] are not sufficient to justify curtailment or reduction of your clinical privileges...." Neither Respondent Carey nor anyone else on behalf of the College of Medicine appealed the Associate Dean's decision not to curtail or reduce Petitioner's medical staff privileges. Although Petitioner did initiate an appeal of the "strong reprimand," he eventually decided to dismiss that appeal.

The third attempt by Respondent Carey to interfere with Petitioner's medical staff privileges was initiated



by Respondent Carey's May 31, 1980, letter to Petitioner, in which Respondent Carey purported to summarily suspend Petitioner's admitting and operating privileges at The University Hospitals; this summary suspension was immediately appealed by Petitioner to the Executive Committee of The University Hospitals, and that Committee promptly concluded that Respondent Carey's action was unwarranted.

Respondent Carey was obviously not deterred by the official rejection of his three attempts to revoke or curtail Petitioner's medical staff privileges. In the spring of 1981, as described above, Respondent Carey refused to recommend Petitioner's annual application for reappointment to the



medical staff for the year commencing July 1, 1981. The present lawsuit was then filed.

On July 17, 1981, -- the day after the lawsuit was filed -- District Judge Joseph P. Kinneary conferred in chambers with counsel for all parties. In that conference, Judge Kinneary stated to counsel that Petitioner's application for reappointment to the medical staff should be forwarded by Respondent Carey to the MSAC for processing in the same manner as other such applications for reappointment were processed. Counsel for Respondents requested that Respondent Carey be allowed to explain to the MSAC his reasons for refusing to recommend the reappointment of Petitioner to the medical staff. Judge Kinneary agreed



to this request, directing that Respondent Carey personally explain to the MSAC his reasons for refusing to recommend the reappointment of Petitioner to the medical staff, that Petitioner should be present during this explanation and that he be allowed to respond personally to Respondent Carey's explanation. Judge Kinneary indicated to counsel that his directives were prompted by consideration of judicial economy, for if the MSAC acted favorably on Petitioner's application for reappointment, the present lawsuit would be moot. At no time did Judge Kinneary order or suggest that the MSAC conduct a "due process" hearing on Petitioner's application for reappointment to the medical staff.



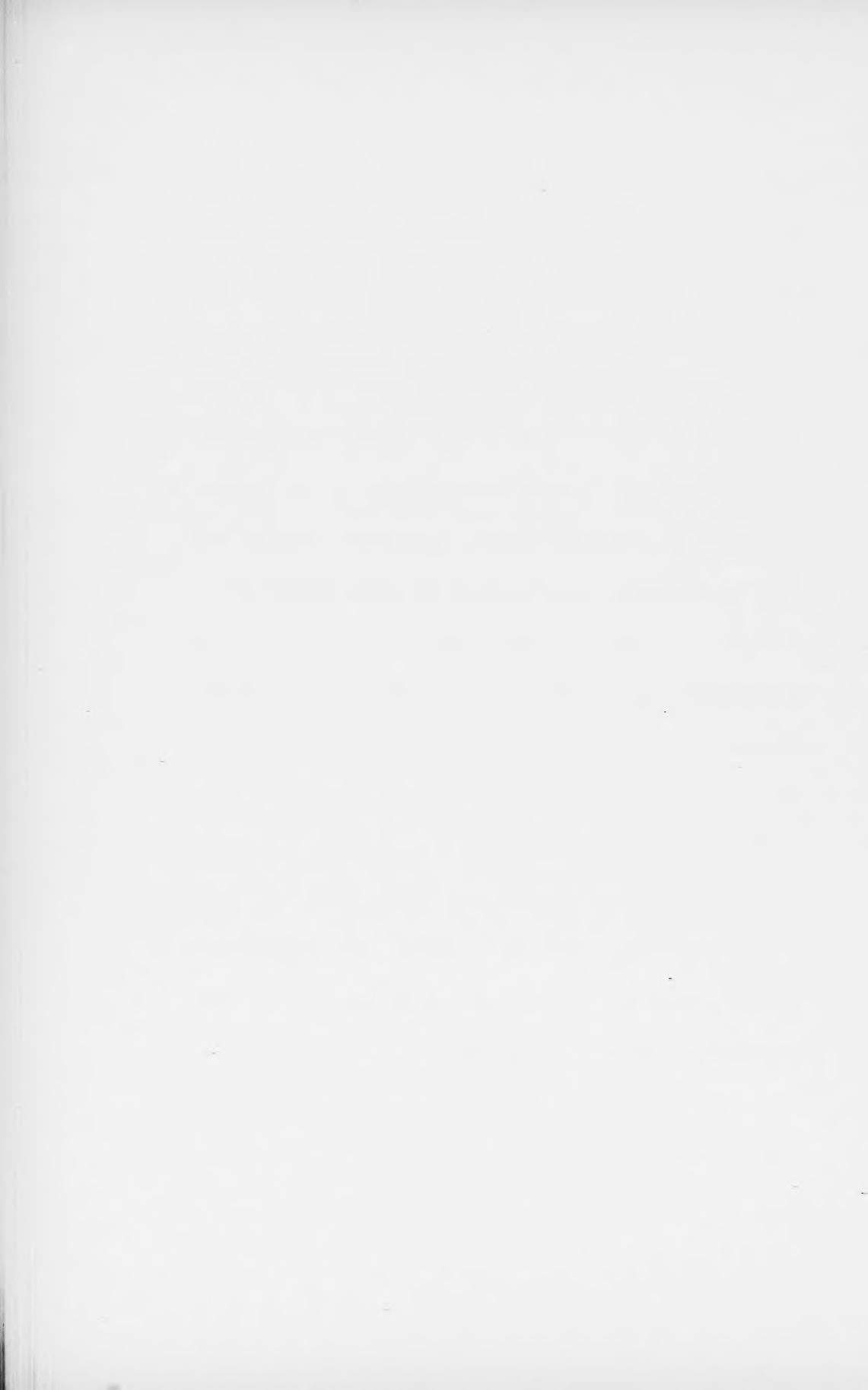


The MSAC meeting called to consider Petitioner's application for reappointment to the medical staff occurred on September 1, 1981. At that meeting Respondent Carey was permitted to parade thirteen witnesses before the MSAC to give testimony against Petitioner. Virtually all of the testimony from these witnesses concerned incidents which were the subject of the prior disciplinary proceedings and which had already been officially rejected as grounds for removal or curtailment of Petitioner's medical staff privileges. In addition, Respondent Carey presented to the MSAC a compilation of documents which had been prepared specifically for use in one of the prior disciplinary proceedings. Not only was Petitioner



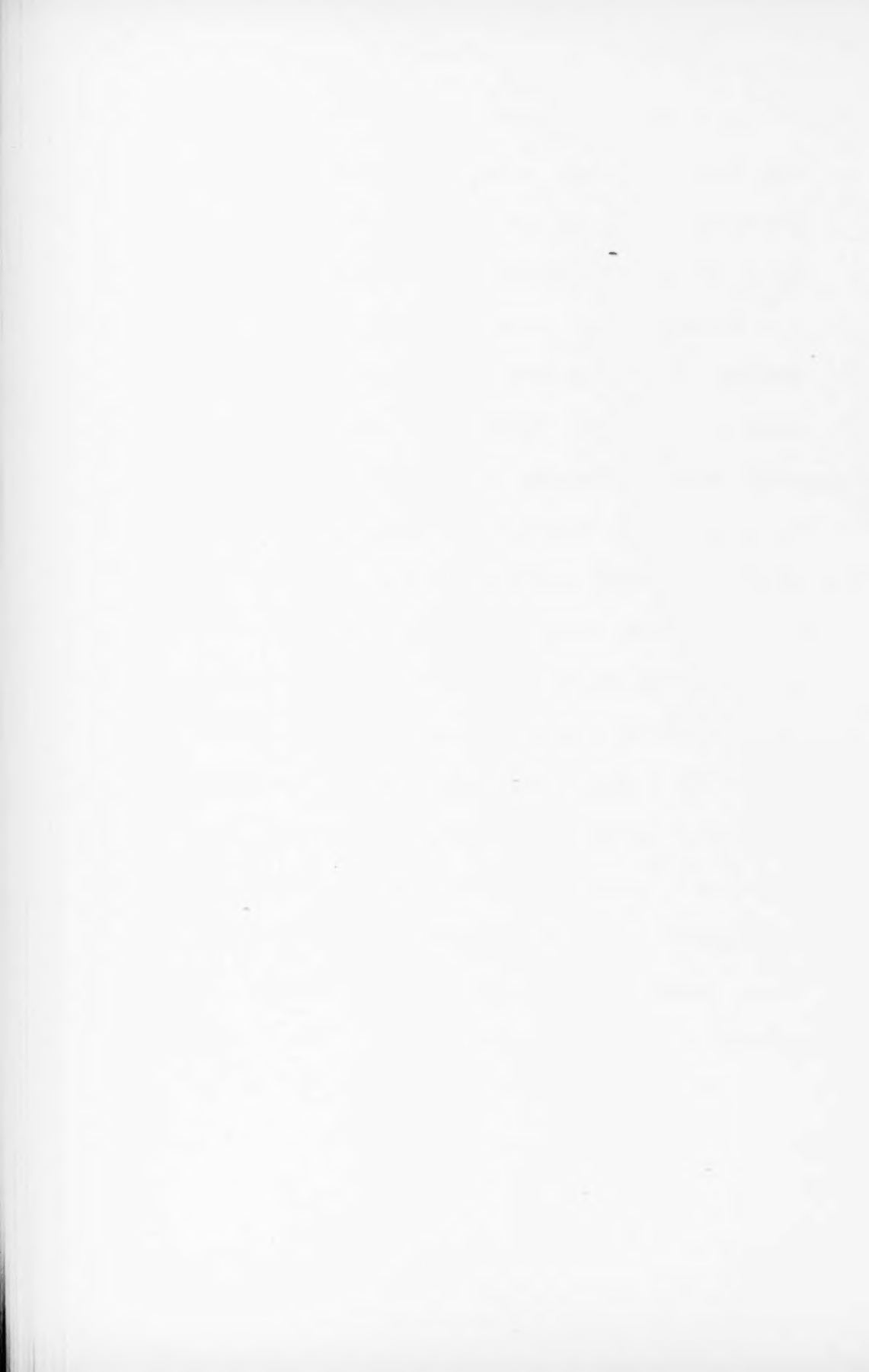
not allowed an opportunity to secure and present witnesses on his own behalf, but also he was not allowed an opportunity to secure and present to the MSAC documents which he had compiled for use in the previous disciplinary proceedings. These documents would have refuted much of the testimony presented to the MSAC.

At the conclusion of its September 1, 1981, meeting, the MSAC voted on Petitioner's application for reappointment to the medical staff. In light of the one-sided nature of the meeting, the result of the voting was assured: the MSAC rejected Petitioner's application for reappointment. The MSAC did not issue any decision, oral or written, stating the reasons for rejecting Petitioner's



application for reappointment to the medical staff or the evidence it relied upon in rejecting that application.

Respondents eventually filed a motion for summary judgment in which they contended that the September 1, 1981 MSAC meeting provided Petitioner with all the procedural due process to which he was entitled. It should be noted that the parties stipulated, and the district court held, that Petitioner's expectation of reappointment to the medical staff was a property interest protected by the due process clause of the fourteenth amendment to the federal Constitution; that holding was never challenged on appeal.



In its February 26, 1981 Opinion And Order, the district court sustained the motion for summary judgment. That Opinion And Order was affirmed on August 3, 1987 by the Sixth Circuit Court of Appeals, and this petition followed.

B. Basis For Federal Jurisdiction

The jurisdiction of the district court was invoked under 28 U.S.C. §§1331 and 1343, 42 U.S.C. §1983, and the fourteenth amendment to the United States Constitution.

REASONS FOR GRANTING OF PETITION

A. The Decision Below Conflicts with Decisions of This Court

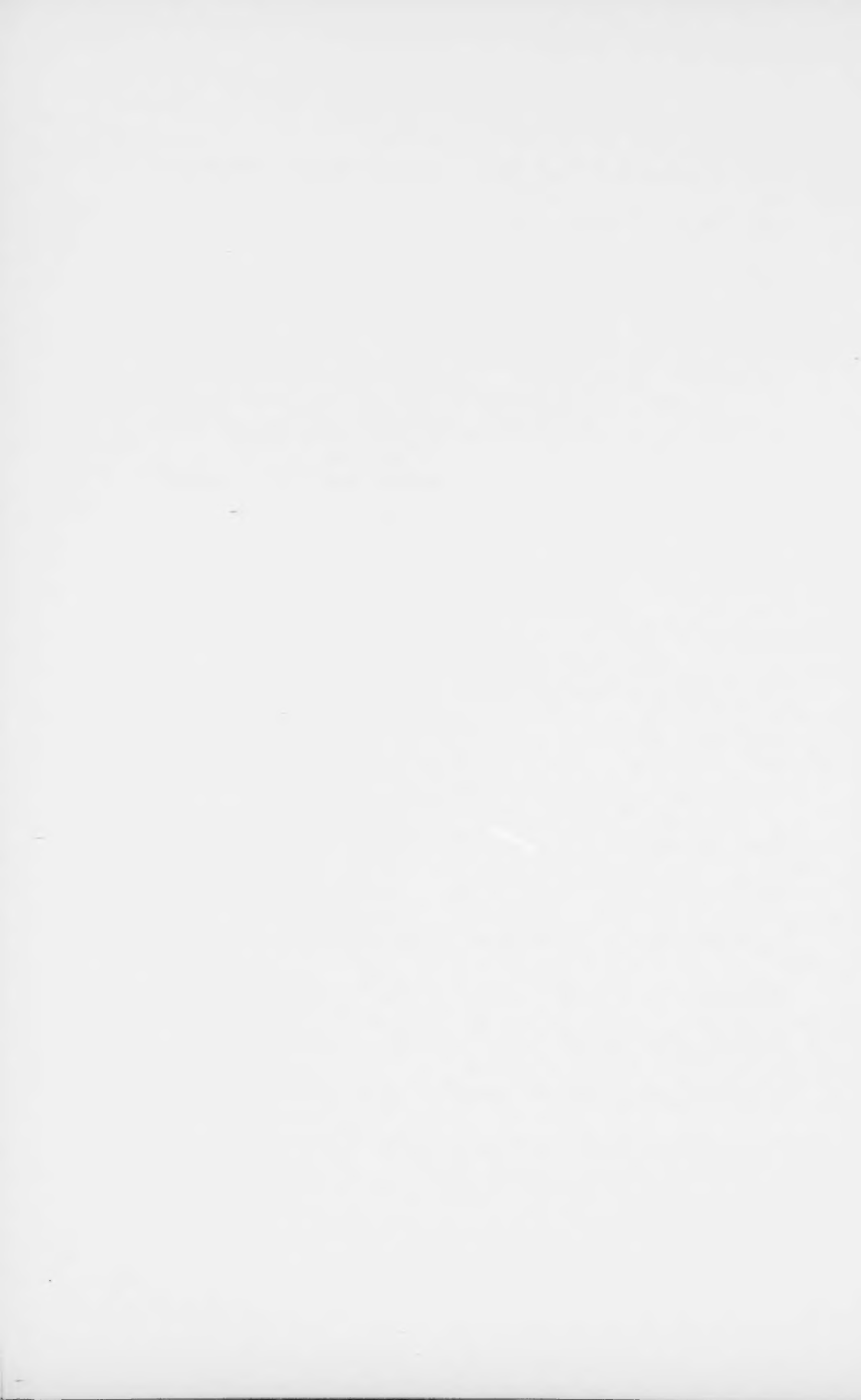
The decision of the court of appeals that procedural due process was





not violated in this case even though the MSAC rendered its decision without hearing from any witnesses on behalf of Petitioner and without stating the reasons for its decision and the evidence it relied upon is contrary to a number of prior decisions of this Court. Although none of these prior decisions involved reappointment to a medical staff, the principles announced in such decisions are applicable to the present case.

Prior to discussing the specific due process violations which engendered this petition, the importance to Petitioner of being reappointed to the medical staff of The University Hospitals must be briefly noted. In determining what amount of process is constitutionally required by the due



process clause in any specific fact situation, the interest of the individual which is at stake is of critical importance. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The court of appeals grossly understated the importance to Petitioner of being reappointed to the medical staff of The University Hospitals; according to that court, Petitioner's interest in being reappointed was limited to maintaining "his professional reputation and his income." Yashon v. Hunt, 825 F.2d at 1022 (Appendix, page 11). Although these interests are surely substantial, they do not include the paramount interest to Petitioner in being reappointed--that of being able to continue his chosen career as a



professor of neurological surgery in an academic setting.

Virtually all of Petitioner's career has been devoted to practicing medicine in an academic setting. To this day, Petitioner retains his tenure at The Ohio State University College of Medicine, but denial of staff privileges at The University Hospitals has denied him the opportunity to teach. Neurologic surgery is taught by having patients in a hospital; it was undisputed that The University Hospitals was the primary teaching institution for the College of Medicine, and in fact faculty members of The College of Medicine were routinely required to conduct all of their patient practice at The University Hospitals. Hence, by



denying Petitioner reappointment to the medical staff of The University Hospitals, Respondents have in effect attempted to detenurize Petitioner and to terminate his career as an academic professor of neurologic surgery.

1. Prior Decisions Of This Court Hold That When An Individual Is Faced With A Possible Deprivation Of An Important Property Interest Protected By The Due Process Clause Of The Fourteenth Amendment, The Individual Must Be Afforded The Opportunity To Call Witnesses On His Own Behalf

Certainly the most flagrant violation of procedural due process that occurred at the MSAC meeting was Respondents' refusal to allow Petitioner the right to call witnesses on his own behalf. This violation, shocking as it was in and of itself, takes on additional importance in light





of the fact that Respondent Carey was allowed to call thirteen witnesses before the MSAC to testify against Petitioner and in light of the uncontestable finding of the district court that "it is clear that Dr. Yashon did not, prior to the hearing of the Medical Staff Administrative Committee, have any notice that Dr. Carey planned to call witnesses;..." February 26, 1982 Opinion And Order, pages 64-65 (Appendix, pages 85-86).

As stated in Grannis v. Ordean, 234 U.S. 385, 394 (1914): "The fundamental requisite of due process of law is the opportunity to be heard." The court below in effect limited "the opportunity to be heard" to an opportunity simply to cross-examine adverse witnesses and to make



statements in one's own behalf. This limitation is contrary to decisions of this Court.

A "hearing" at which only one side is allowed to call witnesses hardly comports with due process. The right of an individual to present evidence in his own behalf at an administrative hearing is a universally recognized constitutional requirement of procedural due process. E.g., Goss v. Lopez, 419 U.S. 565 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

Petitioner recognizes that the constitutional right to be heard in one's defense does not in all cases mandate a formal adjudicatory hearing



in which the parties may call witnesses to testify; in cases involving temporary and minor deprivations of rights, due process may not require that the parties be allowed to call witnesses before the decision-maker. See, e.g., Goss v. Lopez, supra (10-day suspension from school). However, in cases such as the present one, which involve the possible deprivation of an extremely important property interest--the right to continue in one's chosen career--and where disputed factual issues are present, the constitutional right of the individual to call witnesses before the administrative fact-finder has long been established. Wolff v. McDonnell, supra; Morrissey v. Brewer, supra; Goldberg v. Kelly; 397 U.S. 254 (1970).



The court of appeals advanced three reasons for holding that procedural due process was not violated in this case even though the MSAC did not hear from any witnesses on Petitioner's behalf. None of these reasons is valid.

First, the court of appeals stated:

[P]laintiff mischaracterizes the situation when he claims that the defendants refused to allow him the right to call witnesses, since he never requested permission to call his own witnesses. At the outset of the MSAC hearing, plaintiff objected to the presentation of witnesses by Dr. Carey but he did not ask to present his own witnesses nor did he seek a continuance for the purpose of obtaining witnesses. Instead, he agreed to proceed with the hearing and respond to the witnesses called by Dr. Carey. Plaintiff therefore did not claim before the MSAC that he was entitled to call witnesses on his own behalf. Accordingly, there was no outright refusal by the defendants to allow plaintiff to call his own witnesses.





Yashon v. Hunt, 825 F.2d at 1023  
(Appendix, page 13).

These statements are clearly incorrect and misleading. At several points during the MSAC meeting, Petitioner complained that "his side of the story" was not being presented. At least one of the members of the MSAC also complained that Petitioner should be given the opportunity to put on his case, as opposed to just cross-examining Respondent Carey's witnesses and making statements in his own behalf. All these complaints were ignored. It is therefore clear that Petitioner did request the right to call witnesses on his own behalf.

The statement by the court of appeals that Petitioner should have sought a continuance for purposes of



obtaining his own witnesses is also unfounded. It is clear from the transcript of the MSAC meeting that the MSAC was only going to listen to Respondent Carey's evidence. For example, at the conclusion of testimony by Respondent Carey's witnesses, one of the members of the MSAC suggested that the hearing be concluded; this suggestion touched off the following remarkable colloquy:

Dr. Whitcomb [Chairman of the MSAC]: Unless there are questions for Dr. Hunt, I think it should be concluded. I think both Dr. Carey and Dr. Yashon should have the opportunity to make some concluding remarks. Those remarks should be brief because the time has been long.

Dr. Berggren [a member of the MSAC]: Mike, is it your intention to have any rebuttal witnesses, for us to hear the grievance committee or any similar things, or is this

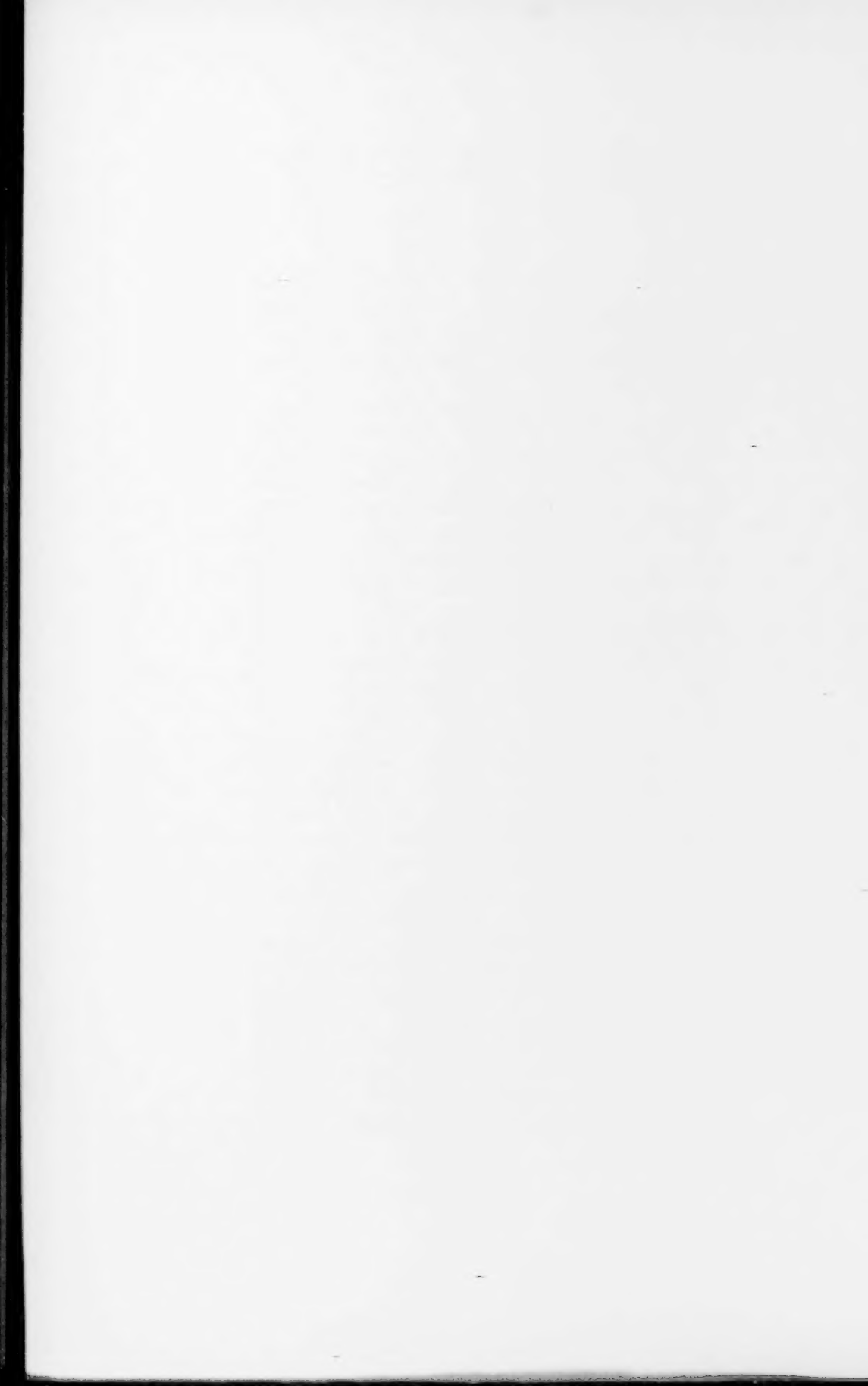


presentation the final one  
which we must address?...

. . .

Dr. Berggren: ...It would seem appropriate to hear from the grievance committee and to give David an opportunity for rebuttal. Seemingly, there were some witnesses who convinced the grievance committee that he had done some good things. We have heard a lot of witnesses that said he has done a lot of bad things. I have been listening to these things for about five years, and I am still confused. I don't know whether that's your intention, but I would suggest that it should be.

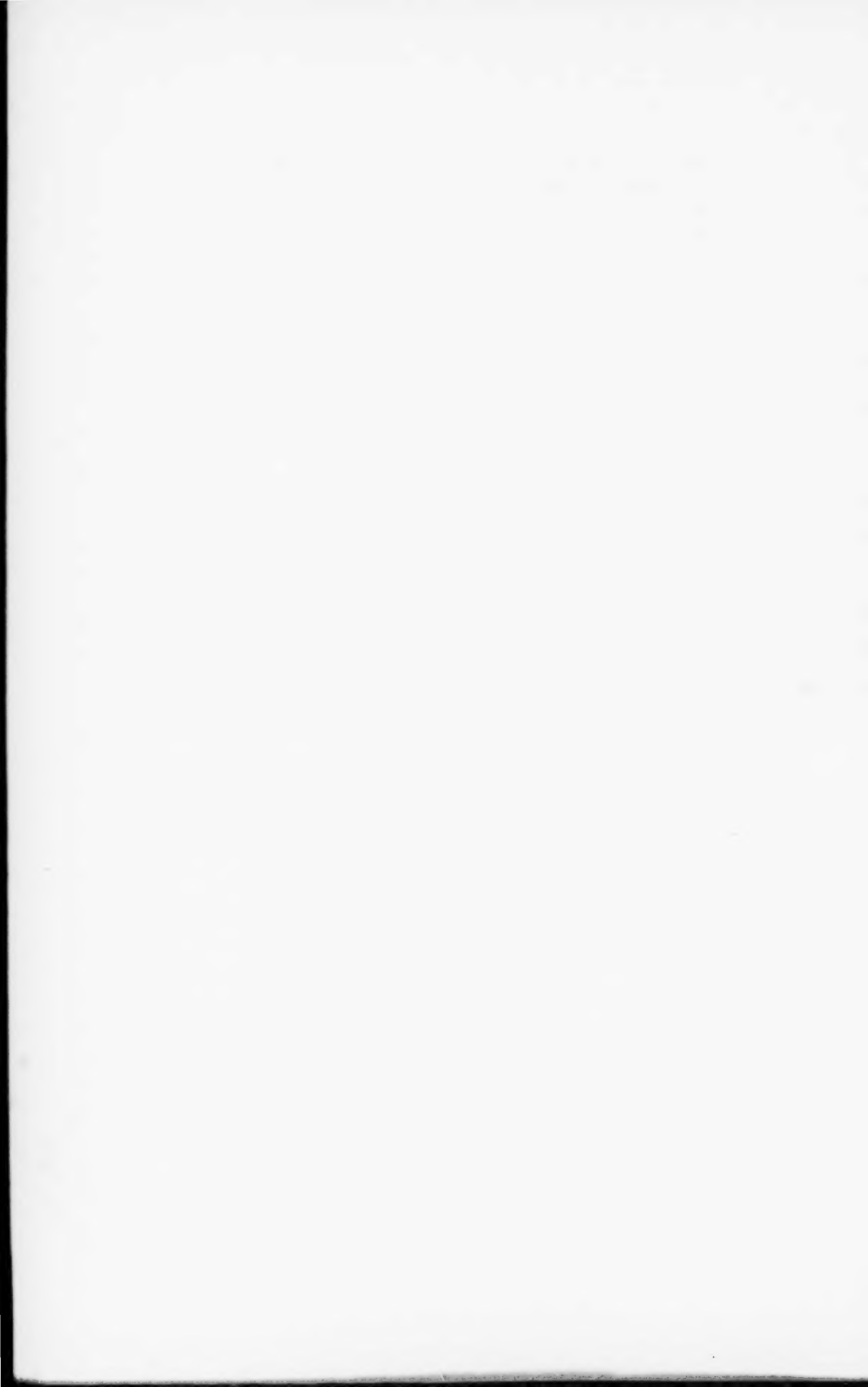
Dr. Whitcomb: Well, my intention was that we adhere to the directions that were given in chambers and conveyed to us by counsel, Ron, which was that the purpose of this hearing was to hear Dr. Carey's presentation of his reasons for not recommending Dr. Yashon for reappointment to the medical staff. It was not specifically to completely go over ever [sic] fact that could be raised on both sides, but for Larry to present his



reaons and for David to have an opportunity to respond to those and for this group to hear them. That was the intention of the meeting.

Dr. Berggren: But your point that Dave has an opportunity to respond I think would imply that he should have an opportunity to review the evidence and respond to it, rather than have to do it sort of off the cuff. Now, you might say that he has been working on it also for about-- what is it, six years?-- and should have it all at his fingertips, but there is quite a difference. I think Larry's presentation today was very well organized, very well presented and states the case well, but I believe it is Larry's case. If that's the only case we are listening to to make this decision, so be it, but it seems to me to be somewhat unfair, perhaps, and my major concern, really, is that the hearing be a fair meeting.

A discussion then followed concerning the development of the format for the September 1, 1981 MSAC





meeting. The discussion concerning the purpose of the meeting was then renewed:

Dr. Whitcomb: We were in no way attempting to do anything that would be unfair, and we specifically were not to create a situation in which, on the one hand, we present a great deal of information here and a great deal of information there. We were simply to hear why did Dr. Carey make his recommendation? That was all. The purpose of the meeting is what was Dr. Carey's reasoning?

Dr. Berggren: Is this your understanding, Dave?

Dr. Yashon: No.

Given the Chairman's view of the purpose of the MSAC meeting, obviously a request by Petitioner either for the opportunity to call witnesses on his own behalf or for a continuance to secure such witnesses would have been futile.



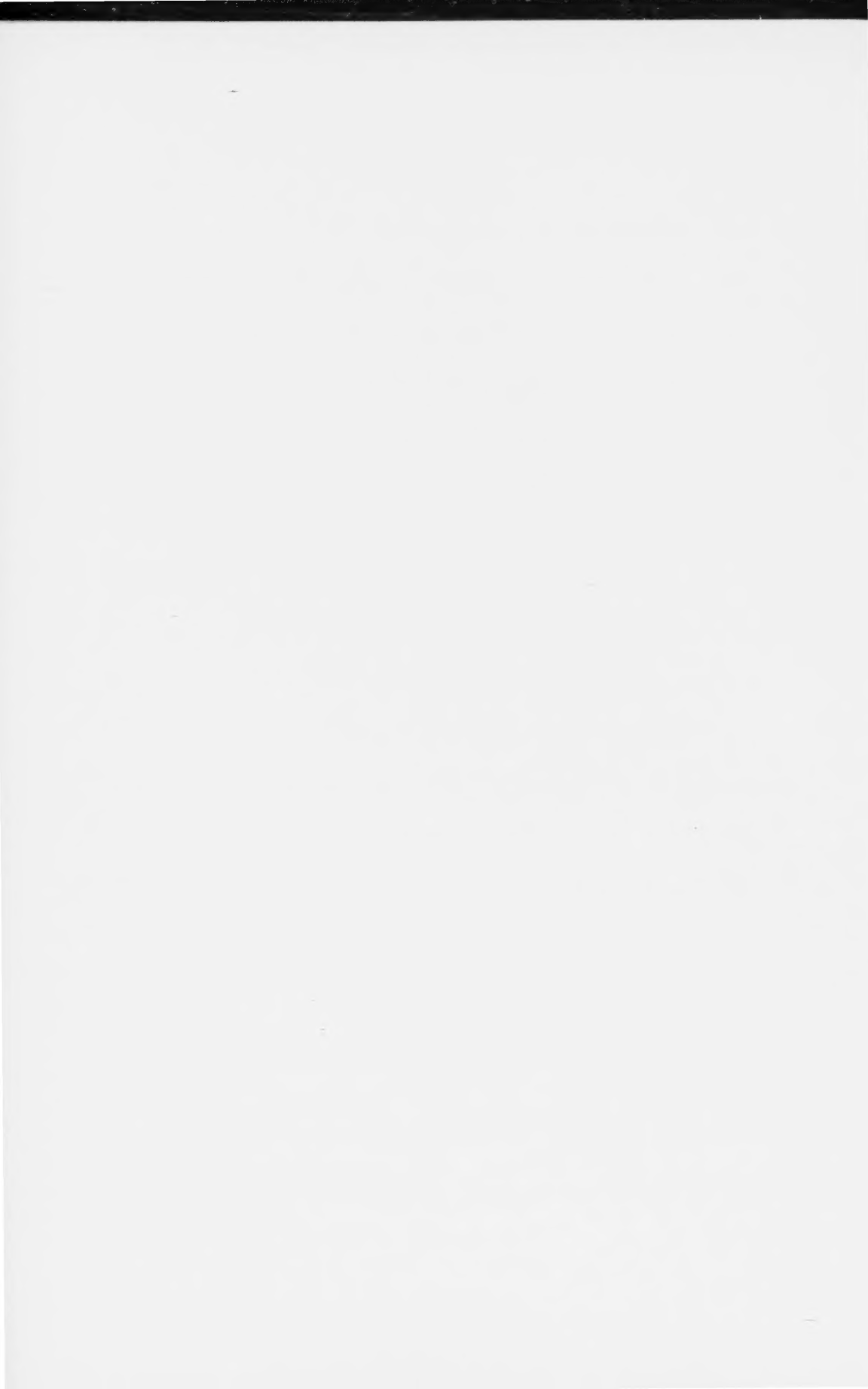
Petitioner had a constitutional right to call witnesses in his own behalf. Although the court of appeals expressly refused to recognize such a right, it also implied that by not expressly asking for the opportunity to call such witnesses and by not seeking a continuance of the meeting to secure the presence of such witnesses, Petitioner waived any right to call witnesses on his own behalf. This implication is unfounded both legally and factually. This Court has held that a waiver of constitutional rights requires a showing of "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Additionally, courts must indulge every reasonable presumption against a waiver



of fundamental constitutional rights. Id. In the present case, Petitioner was never afforded an opportunity by the MSAC to call witnesses on his own behalf; in fact, as demonstrated above the MSAC believed it was only to hear from Respondent Carey's witnesses. Here, Petitioner clearly did not waive his right to call witnesses on his own behalf.

The second reason advanced by the court of appeals for holding that no procedural due process violation occurred when the MSAC rendered its decision without allowing Petitioner to call witnesses in his own behalf was:

[P]laintiff has never shown what additional evidence or testimony he could have presented at the hearing had he been given the opportunity to do so. The district court



below observed that plaintiff had not, either at the hearing or in his filings with the district court, "proffered the name of any witness he would have called." In the absence of any such proffer, we have no basis for concluding that plaintiff was prejudiced by not having any witnesses testify on his behalf.

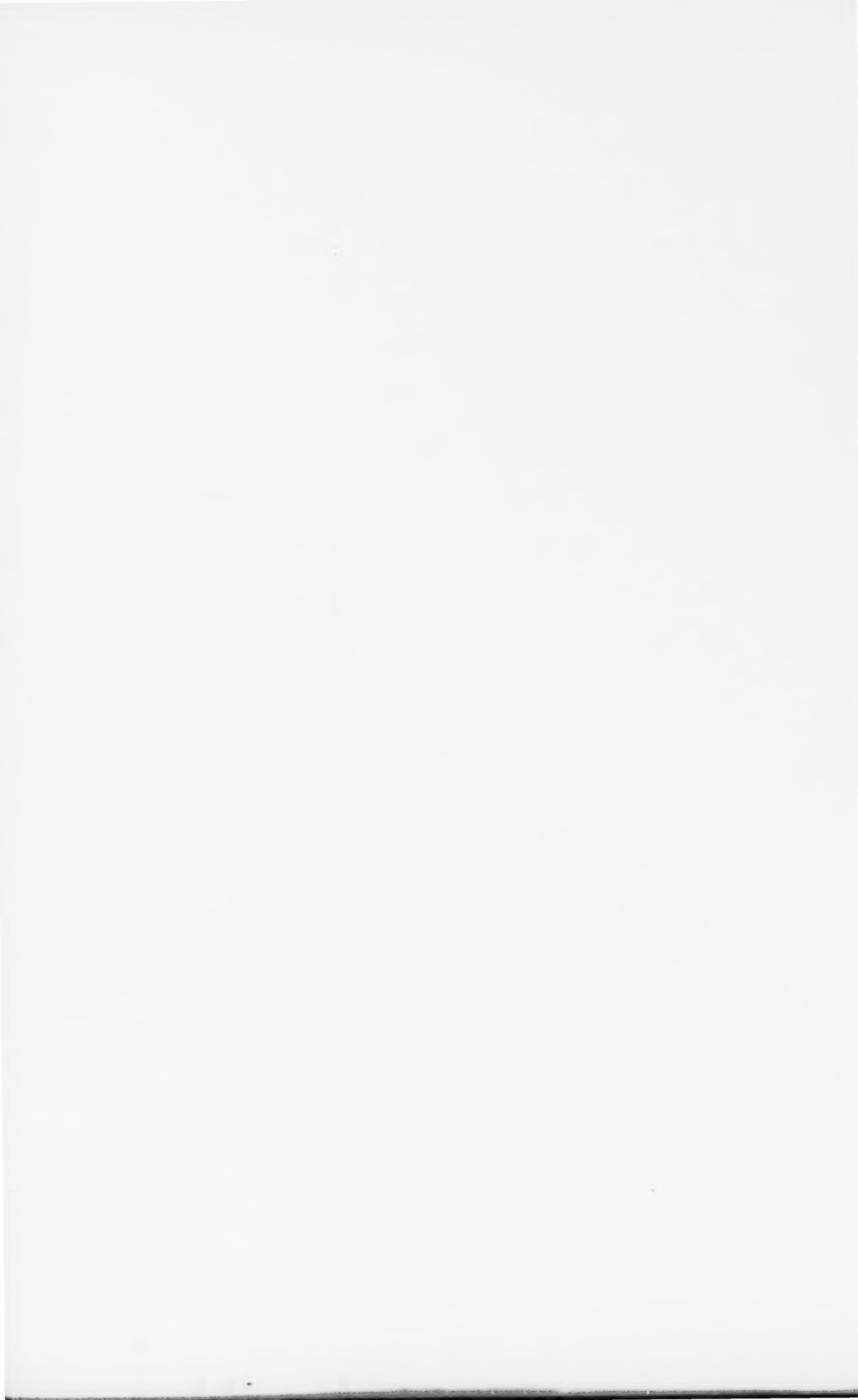
Yashon v. Hunt, 825 F.2d at 1023  
(Appendix, page 14).

This statement is rebutted by the record in this case. Petitioner did indicate at the MSAC meeting that he had witnesses who would rebut Respondent Carey's charges. Additionally, District Judge Kinneary expressly found that a number of the charges pressed against Petitioner by Respondent Carey "are of such a nature as to permit an inference that there are other witnesses whom Dr. Yashon





might have called in support of his contention that the charges are groundless or that the charges are of slight importance"--February 26, 1982 Opinion And Order, page 34, (Appendix, page 55) -- and "were such that, had Dr. Yashon been given the opportunity, he may have been able to present rebuttal testimony"--February 26, 1982 Opinion and Order, page 55, (Appendix, page 76). Finally, at the MSAC meeting, Dr. Berggren, a member of the MSAC, told the Committee: "Seemingly, there were some witnesses who convinced the grievance committee that he [Dr. Yashon] had done some good things." At a minimum, Petitioner could have called the five members of the Grievance Committee, whose report completely exonerated Petitioner. In summary, the



record is replete with indications that Petitioner had witnesses who could have testified in his behalf and hence it is incorrect for the court below to assume that Petitioner was not prejudiced by the failure of Respondents to allow him to call witnesses on his own behalf.

The third reason stated by the court of appeals for rejecting Petitioner's claim that he had a right to call witnesses in his own behalf was that:

[W]e are satisfied that the essential requirement of procedural due process was satisfied here; that is, plaintiff was afforded a meaningful opportunity to be heard. Throughout the hearing, plaintiff had the means to rebut the evidence presented against him, as he was permitted to thoroughly cross-examine the witnesses called by Dr. Carey and to make statements on his own behalf in response to the witnesses' testimony.



Yashon v. Hunt, 825 F.2d at 1023-24  
(Appendix, pages 14-15).

This reason has already been rebutted above. The right of Petitioner to be heard was not limited to the right to cross-examine adverse witnesses called by the State and to make statements in his own behalf; that right included the right to call witnesses on his own behalf.

2. Prior Decisions Of This Court Hold That Both Procedural And Substantive Due Process Require That The State, In Terminating A Property Interest Protected By The Due Process Clause Of The Fourteenth Amendment, Specify Both The Reasons For Its Decision And The Evidence It Relied Upon

Once a state-operated hospital grants a physician medical staff privileges, the hospital can terminate



or refuse to renew those privileges "only for those matters which are reasonably related to the operation of the hospital." Sosa v. Board of Manager of Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971). The hospital's decision to terminate or not to renew the physician's medical staff privileges must "be untainted by irrelevant considerations and supported by sufficient evidence to free it from arbitrariness, capriciousness or unreasonableness." Woodbury v. McKinnon, 447 F.2d 839, 842 (5th Cir. 1971). In other words, a physician whose medical staff privileges are being terminated, either by revocation of those privileges or by failure to reappoint him to the medical staff, is





entitled to substantive as well as procedural due process.

To allow a reviewing agency or a reviewing court to determine if substantive due process has been complied with by an administrative agency which has deprived a person of a property interest protected by the due process clause of the fourteenth amendment, the United States Supreme Court has held that due process requires the agency to recite, either orally or in writing, both the reasons for its actions and the evidence which it relied upon. Wolff v. McDonnell, supra at 564; Morrissey v. Brewer, supra at 489.

In the present case the MSAC did not state either the reasons for its decision to reject Petitioner's application for reappointment to the



medical staff or the evidence it relied upon in making that decision. It was therefore impossible for the courts in this case to review the MSAC's action to determine if that action complied with substantive due process.

The requirement of a statement from the MSAC as to the reasons for its decision and the evidence it relied upon is especially important in this case for two reasons. First, as District Judge Kinneary found, "there was no testimonial evidence as to" six of the twenty-two charges leveled against Petitioner by Respondent Carey at the MSAC meeting. February 26, 1982 Opinion And Order, page 32. (Appendix, page 53). Without the benefit of a statement from the MSAC as to the reasons for its decision and the

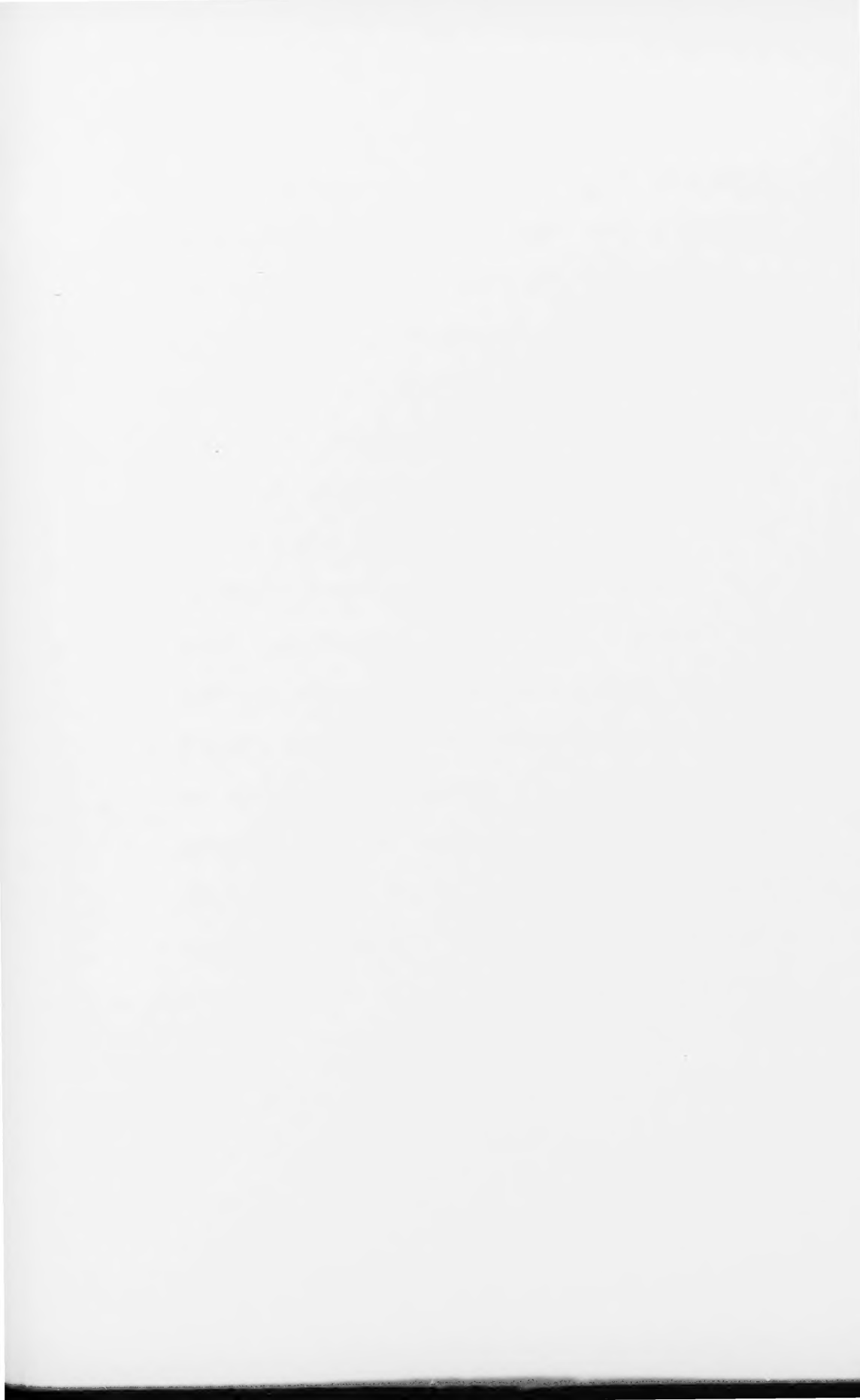


evidence it relied upon, it is impossible to determine if its decision was based in whole or in part on charges for which there was no evidence. Second, as Judge Kinneary also found, none of the charges preferred by Respondent Carey against Petitioner alleged "conduct violative of presently promulgated bylaws of The University Hospitals Board or of any other administrative rules governing the conduct of the members of the medical staff,... ." February 26, 1982 Opinion And Order, page 58 (Appendix, page 79.) The absence of any such violation of bylaws or rules, coupled with the lack of any indication from the MSAC as to why it decided to reject Petitioner's application for reappointment to the medical staff,



rendered impossible a determination of whether the MSAC based its decision upon reasons rationally related to the operation of The University Hospital.

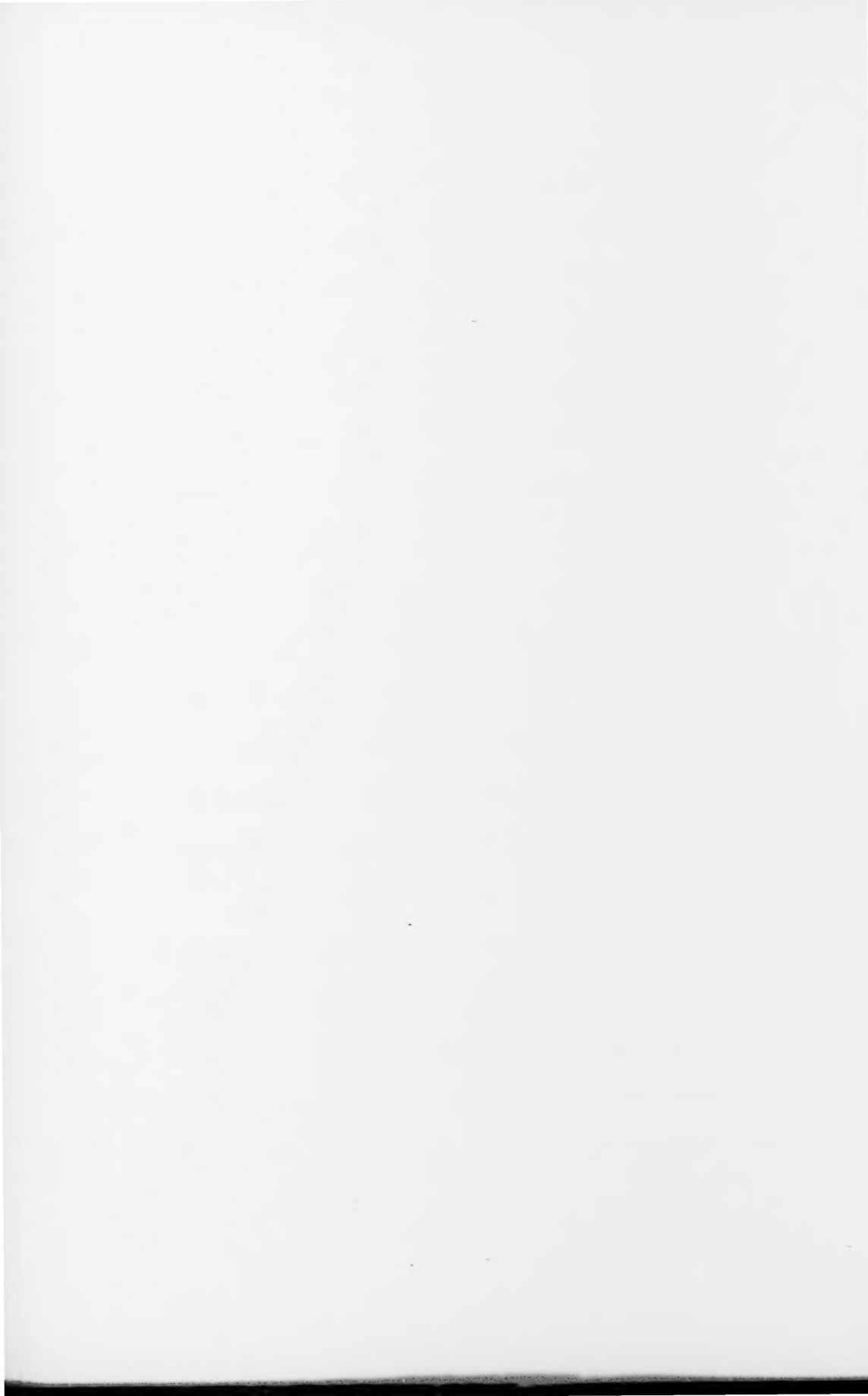
In rejecting Petitioner's claim that the lack of a statement from the MSAC setting forth the reasons for its decision and the evidence it relied upon violated his due process rights, the court of appeals reasoned that because there was a transcript of the MSAC meeting, both the district court and the court of appeals were able to review that transcript and determine that "the MSAC relied on appropriate considerations in rendering its decision." Yashon v. Hunt, 825 F.2d at 1024 (Appendix, page 16). That reasoning is obviously purely speculative; without a statement from





the MSAC stating why it rejected Petitioner's application for reappointment to the medical staff and the evidence it relied on for such rejection, no court can possibly determine that "the MSAC relied on appropriate consideration in rendering its decision." All a court can do in such a situation is speculate that the MSAC may have acted properly. However, pursuant to this Court's decisions in Wolff and Morrissey, Petitioner is constitutionally entitled to a written decision from the MSAC to test whether in fact it did act on proper grounds.

There is another important reason for rejecting the reasoning of the court of appeals that its and the district court's independent review of the transcript of the MSAC meeting



cured any error raised by the failure of the MSAC to state the reasons for the action it took and the evidence it relied upon. The decision to expel a physician from the medical staff of a hospital is clearly the responsibility not of a court but of the proper administrative body within the hospital. Klinge v. Lutheran Charities Association, 523 F.2d 56 (8th Cir. 1975). A federal court's review of such action is limited to determining whether the procedure used complied with due process requirements and whether the administrative body was presented with substantial evidence to support its actions. Woodbury v. McKinnon, supra. Although the MSAC in the present case ruled, after a meeting biased against Petitioner, that the Petitioner should not be reappointed to



the medical staff, it did not state the reasons for such determination or the evidence it relied upon. Hence it is entirely possible that the MSAC based its decision upon arbitrary or unfounded charges, in violation of Petitioner's due process rights. By adopting a rule that the lack of a statement from the appropriate hospital committee as to why it refused to reappoint a physician to the medical staff and the evidence it relied upon is cured by the existence of a transcript of the meeting at which the decision was made and a review of that transcript by a court to determine if there were some adequate grounds for the action taken, the court of appeals in effect transforms the courts of this country into "super medical staff credentials committees", with the power



to determine whether a physician should remain on the medical staff. Such determinations must, however, be made by the appropriate committee of the hospital involved, and not by a court.

B. The Decision Below Conflicts With Decisions Of Other Courts of Appeals

In rejecting Petitioner's claim that he had a constitutional due process right to call witnesses in his own behalf, the decision of the court of appeals below conflicted with decisions of other federal courts of appeals. In a number of cases involving the termination of a doctor's medical staff privileges, federal appellate courts have directly held or implied that the procedural due process protections that must be afforded to the doctor include the right to call witnesses on his own behalf. Lew v.



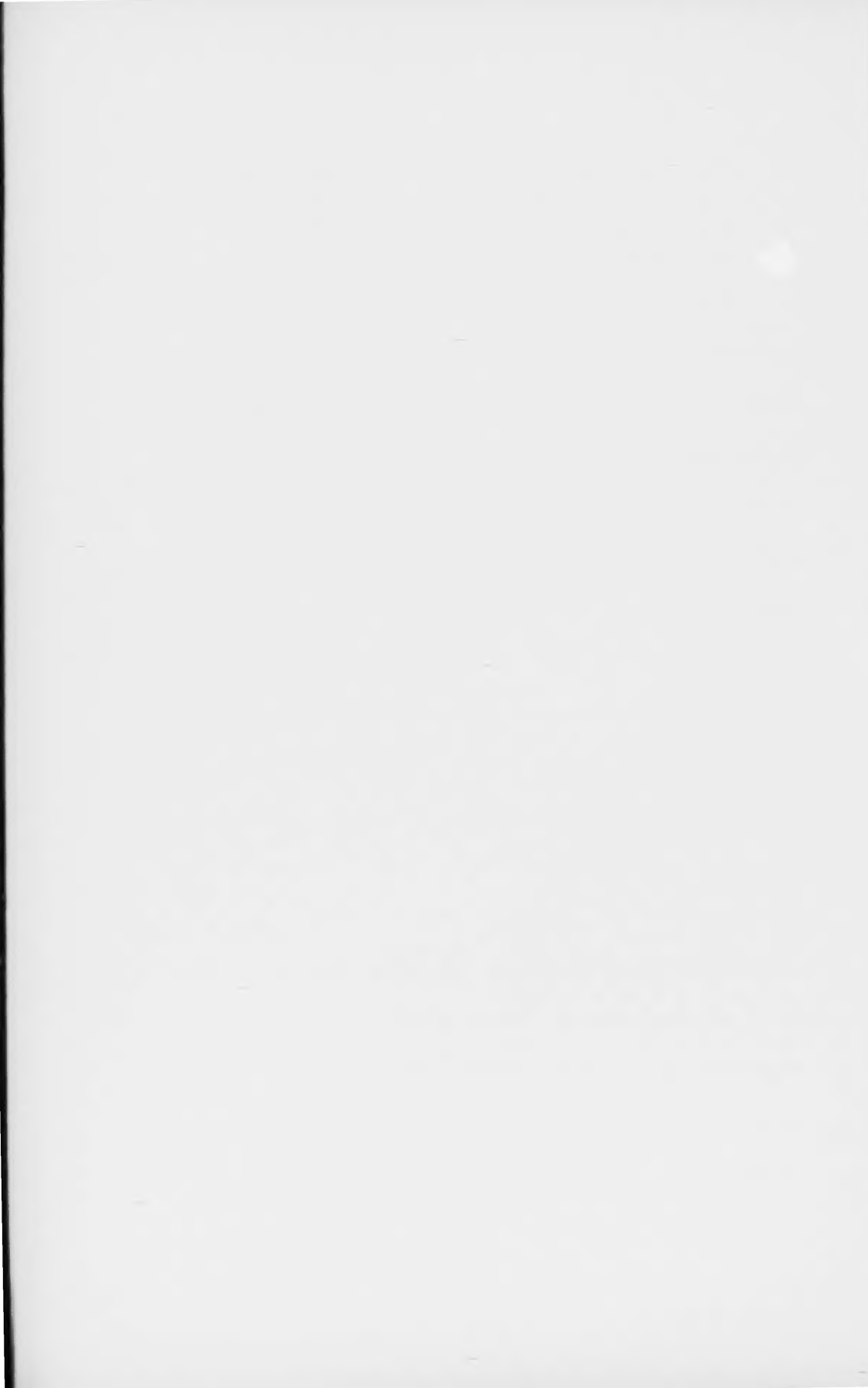


Kona Hospital, 754 F.2d 1420, 1424-25 (9th Cir. 1985); Duffield v. Charleston Area Medical Center, 503 F.2d 512, 515 (4th Cir. 1974) ("In the case of a withdrawal or denial of hospital privileges, procedural due process entitles a physician to a full, evidentiary administrative hearing"); Christhilf v. Annapolis Emergency Hospital Association, Inc., 496 F.2d 174, 178-79 (4th Cir. 1974) (before terminating a doctor's medical staff privileges, procedural due process requires among other things that the physician be afforded "the right to present evidence in his behalf" in addition to "the right to rebut evidence against him, and the right of cross examination."



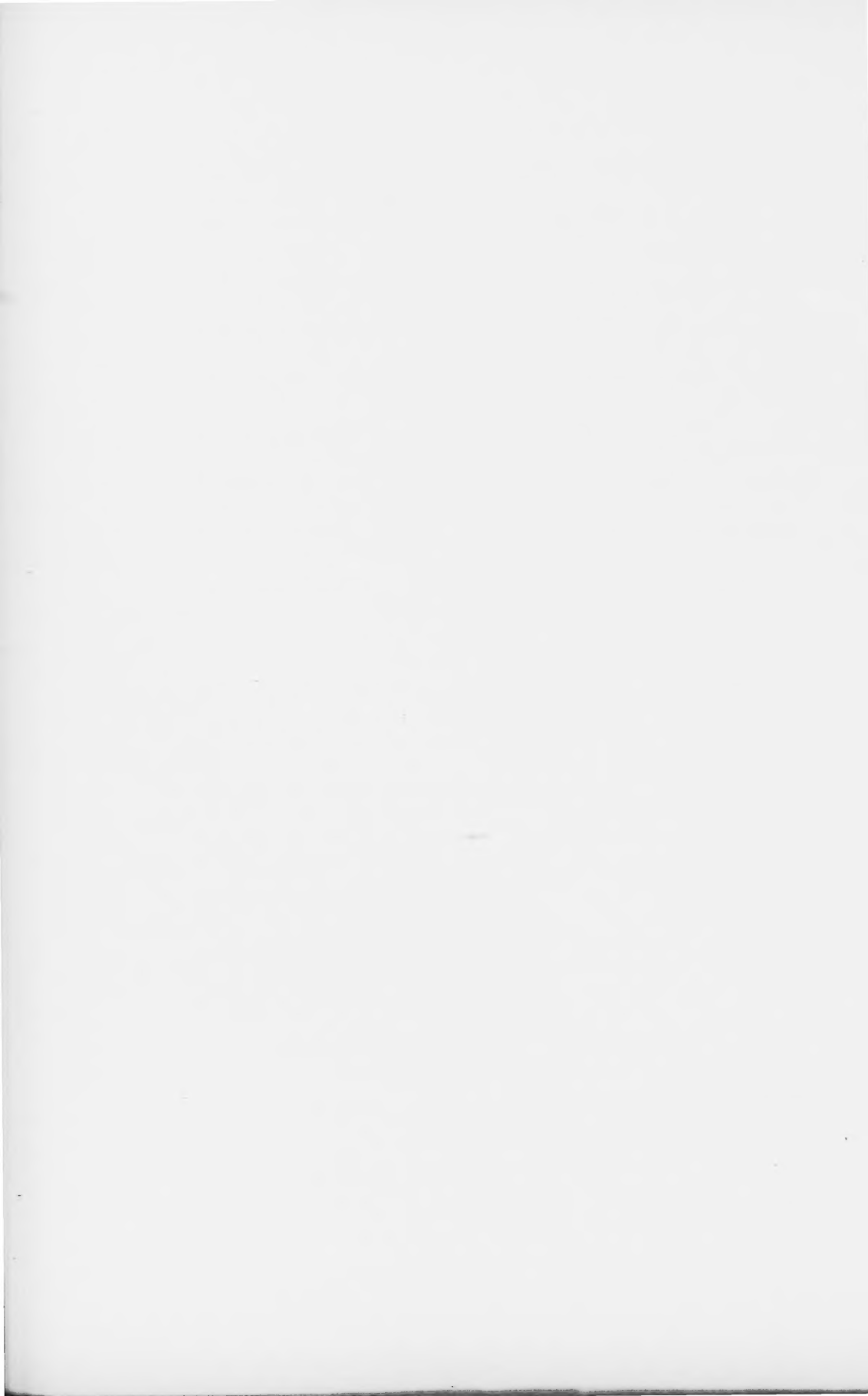
C. The Decision Below Has Decided An Important Question of Law Which Has Not Been, But Should Be, Settled By This Court

Most, if not all, of the charges presented by Respondent Carey at the MSAC meeting in 1981 were utilized by Respondent Carey in prior disciplinary proceedings instituted by him against Petitioner. February 26, 1982 Opinion And Order of the district court, page 34, footnote 24 (Appendix, page 55). Each of these prior proceedings, if successful, would have resulted in the termination of Petitioner's medical staff privileges at The University Hospitals. None of the prior proceedings resulted in any termination or curtailment of such privileges. Therefore, Petitioner argued in both the district court and in the court of appeals that the principle of



administrative res judicata prevented Respondents from utilizing before the MSAC in 1981 as grounds for not continuing Petitioner's medical staff privileges any of the grounds used in any of the prior disciplinary proceedings. The district court rejected this argument, and the court of appeals affirmed that rejection on two grounds.

One of the grounds relied upon by the court of appeals was that "None of the former proceedings reached a point whereby the parties were given a full opportunity to litigate the charges brought against plaintiff." Yashon v. Hunt, 825 F.2d at 1021 (Appendix, page 10). Although this statement is technically correct, it ignores the fact that each of the prior administrative proceedings which form



the factual foundation of Petitioner's administrative res judicata argument provided the opportunity at some point in time for a trial-like hearing with witnesses and cross-examination of adverse witnesses. These prior proceedings were conducted either under Articles V and VI of the prior medical staff bylaws of The University Hospitals or Section 3335-5-04 of the Ohio Administrative Code, which contains the rules of The Ohio State University concerning detenurization. Both sets of rules provided for the presentation of live witnesses, cross-examination of adverse witnesses, and full participation of counsel if the proceedings advanced to a certain level. However, in each of the prior administrative proceedings, the final administrative decision was that





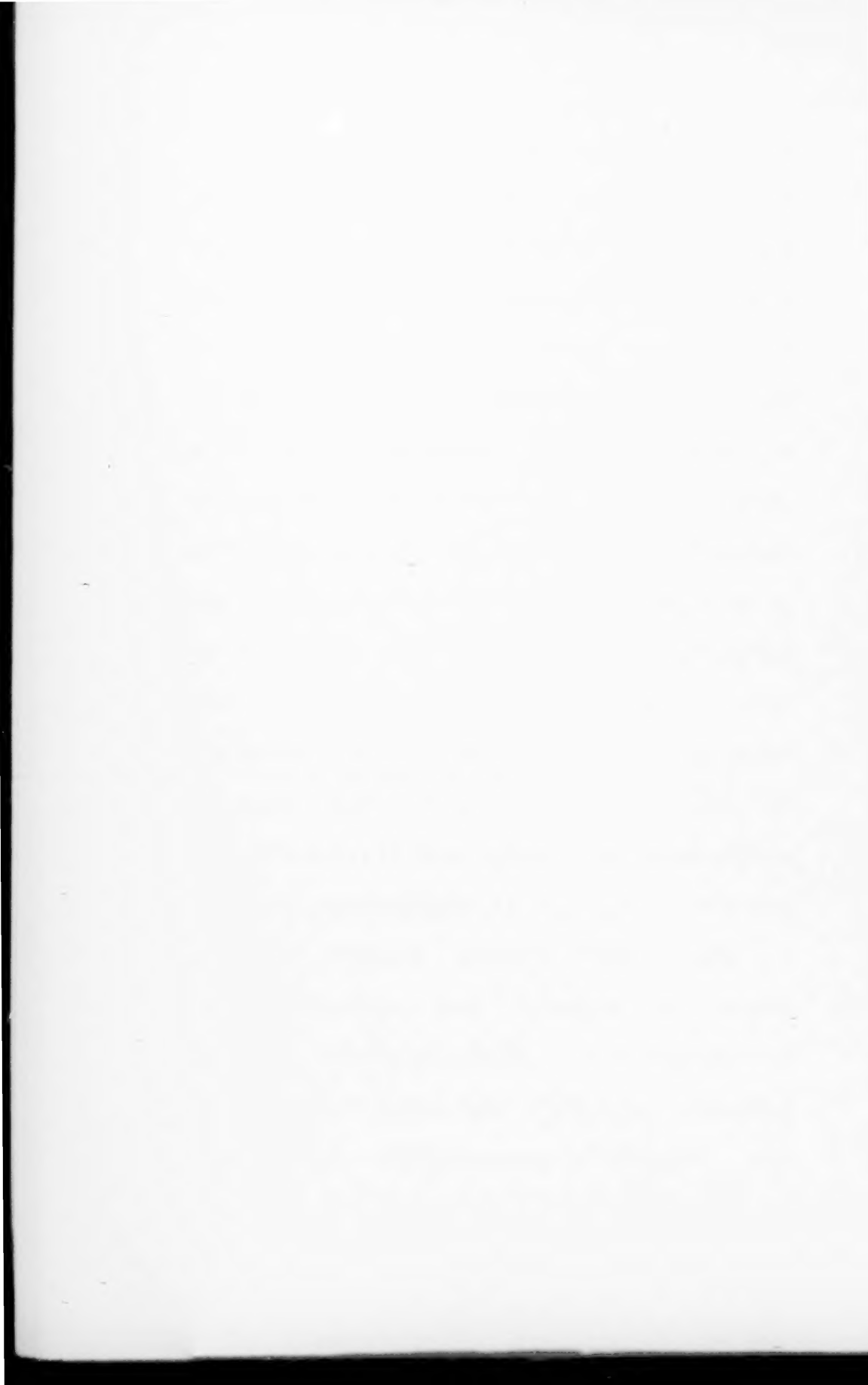
Respondent Carey had failed to present sufficient evidence at the preliminary stage of the administrative proceeding to show that Petitioner's medical staff privileges should be curtailed or terminated.

The court of appeals below fashioned a rule of law that administrative res judicata is applicable only if the formal trial-like stage of administrative proceedings is actually reached. This is a rule of law never passed on by this Court, but one which this Court should settle. It is not uncommon for administrative rules to provide that the trial-like stage of an administrative proceeding will be reached only if some preliminary showing is made at an earlier, informal stage of the proceedings. See Gaston

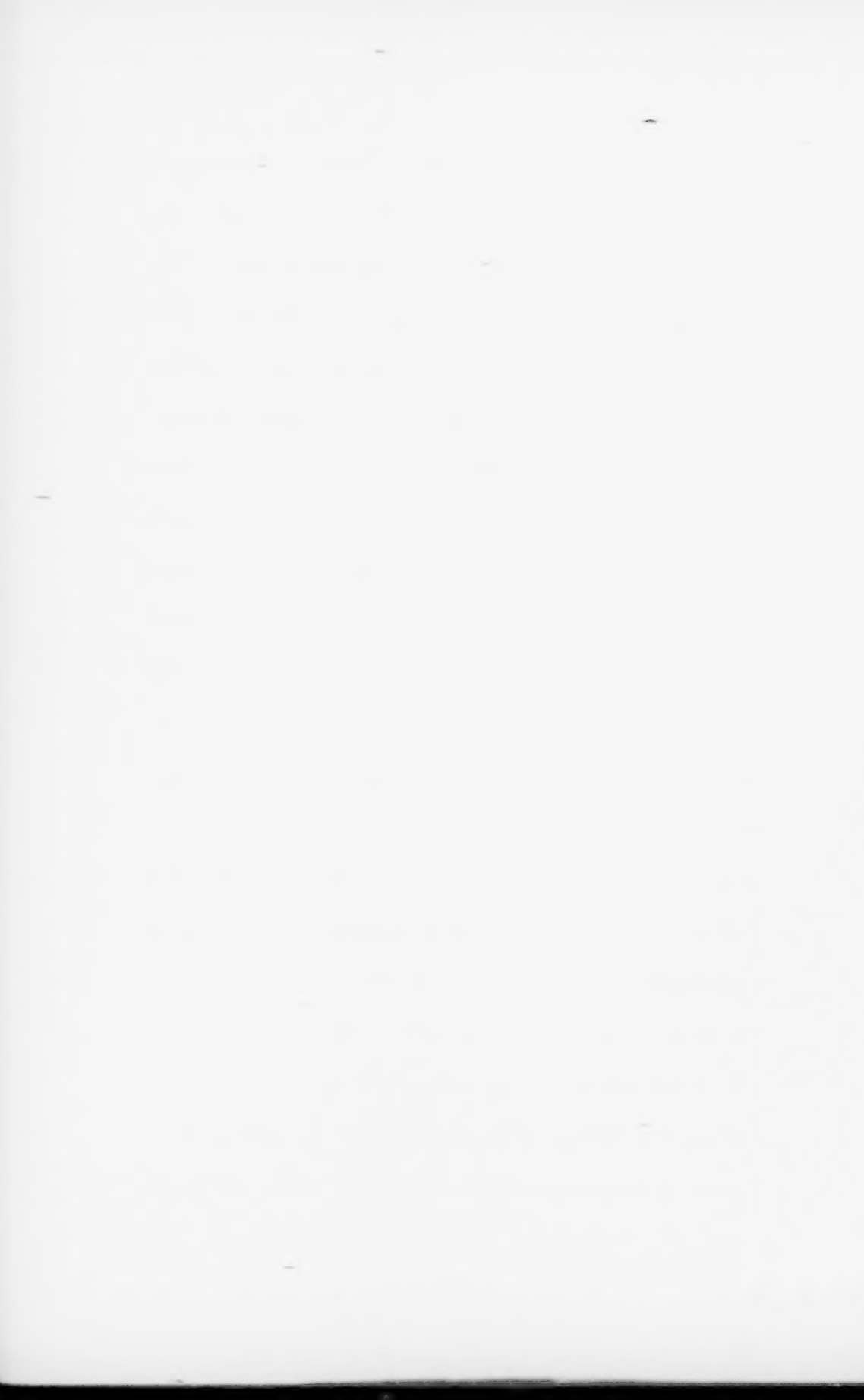


v. Richardson, 451 F.2d 461 (6th Cir. 1971). These informal stages are analogous to motions to dismiss or for summary judgment in judicial proceedings. This Court should settle the issue of whether the termination of an administrative proceeding at some stage before the trial-like stage is reached is sufficient to invoke the principle of administrative res judicata. What little law there is on this issue suggests that the termination of an administrative proceeding at such an earlier stage is sufficient to invoke administrative res judicata. Gaston v. Richardson, supra.

The other reason stated by the court of appeals for rejection of Petitioner's administrative res judicata argument was that "several of the former proceedings did not



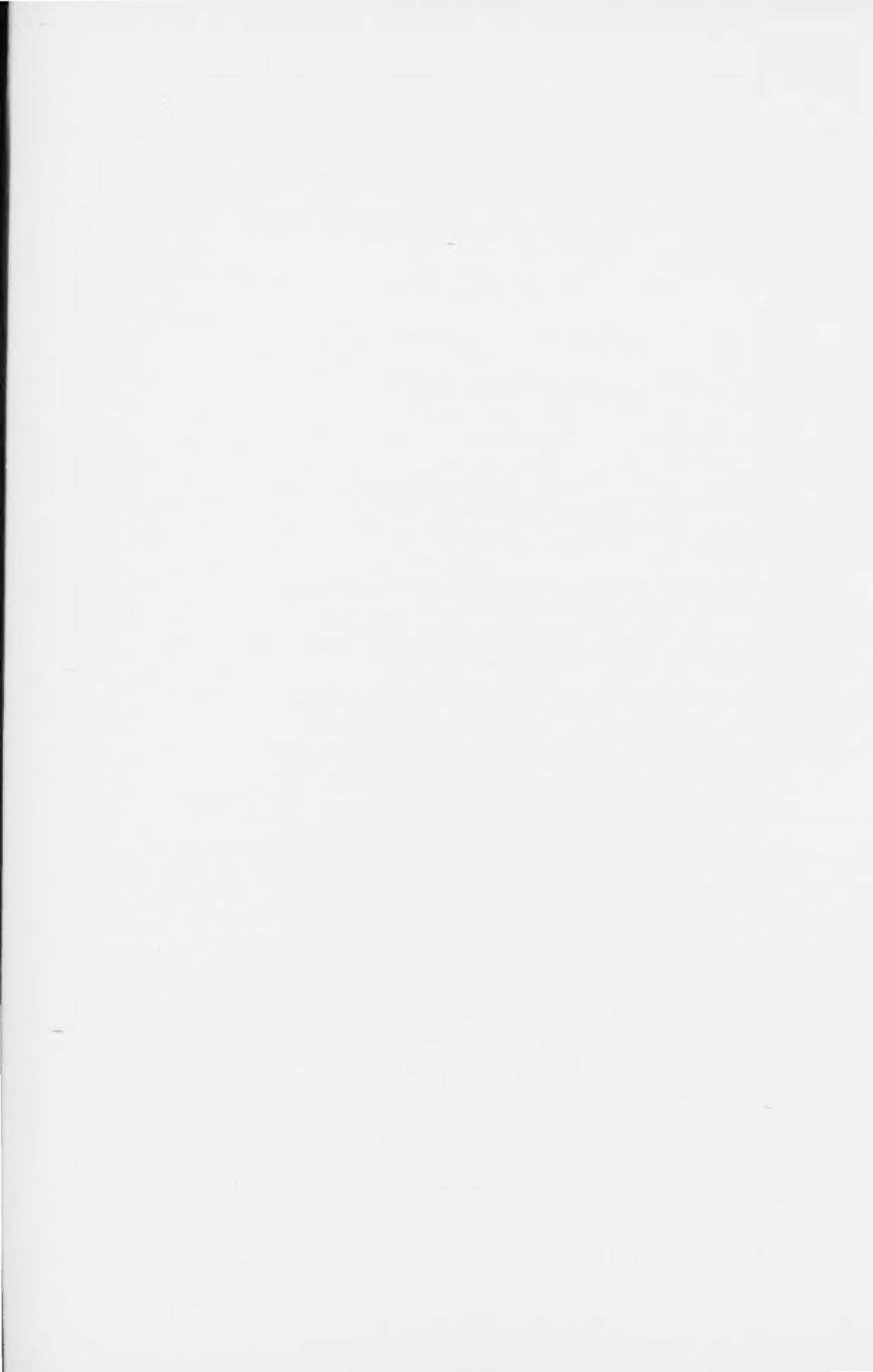
definitively resolve the charges asserted against plaintiff in that he was not completely exonerated of improper conduct." Yashon v. Hunt, 825 F.2d at 1022 (Appendix, page 10). This reason is clearly erroneous and hence it should not prevent this Court from reaching the more important administrative res judicata issue discussed above. To the extent that the prior proceedings sought the termination or curtailment of Petitioner's medical staff privileges, Petitioner was completely exonerated in that insufficient grounds were found in any of these proceedings for such termination or curtailment. The ruling of the court of appeals on this issue is tantamount to a ruling that res judicata does not apply to a plaintiff in a civil suit for money who obtains



as a result of trial a judgment for some amount against defendant which is less than the full amount plaintiff sought. Clearly in such a case, the plaintiff cannot sue defendant on the same cause of action as asserted in the first action for the amount he did not recover in the first action. Similarly, just because Petitioner was allegedly not "fully exonerated" in the prior proceedings does not allow Respondents to attempt once again to terminate his medical staff privileges based on the same charges utilized in the prior proceedings.

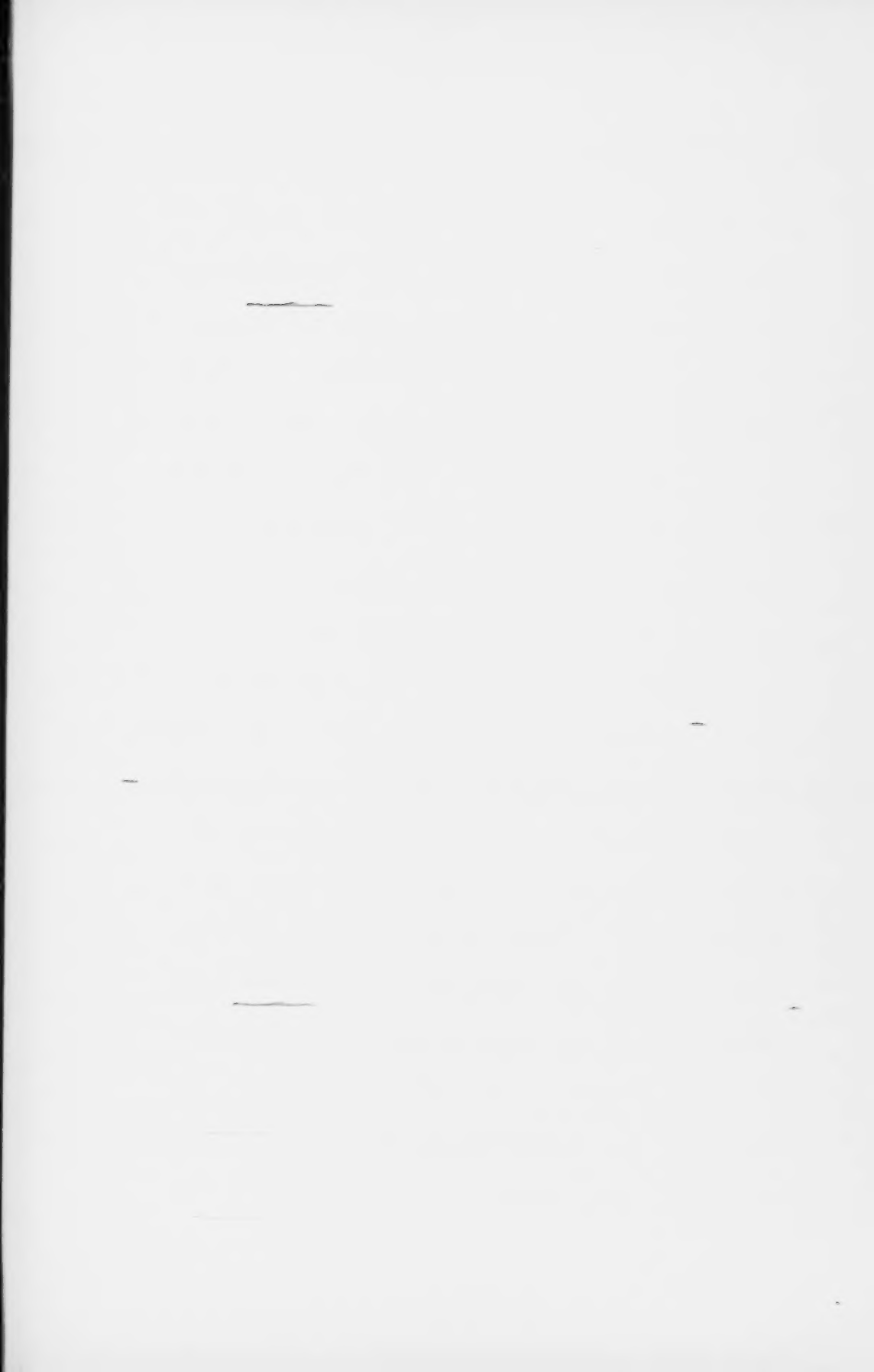
D. The Decision Below So Far Departed From The Accepted And Usual Course of Judicial Proceedings As To Call For An Exercise Of This Court's Power of Supervision

Several gross violations of procedural due process have resulted in





the termination of an extremely important property interest held by Petitioner and admitted by Respondents as protected by the due process clause of the fourteenth amendment to the federal Constitution. The violations of due process consisted in allowing Respondent Carey to call witnesses to testify against Petitioner, while denying to Petitioner the opportunity to present witnesses in his own behalf, and in allowing the MSAC to terminate Petitioner's medical staff privileges without stating either the reasons for such action or the evidence the MSAC relied on. These deprivations of due process are so apparent, and the harm caused by such violations to Petitioner are so great, as to justify this Court's intervention in this case pursuant to this Court's power of



supervision over the lower federal courts.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Thomas A. Young  
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for Petitioner,  
David Yashon, M.D.

87-1587

No.

Supreme Court, U.S.

FILED

DEC 21 1987

JOSEPH F. SPANIOL, JR.  
CLERK

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1987

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DAVID YASHON, M.D.,

Petitioner,

v.

WILLIAM E. HUNT, M.D., et al.,

Respondents.

---

APPENDIX TO PETITION FOR A WRIT  
OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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Thomas A. Young\*  
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(614) 227-2000

Counsel for Petitioner

\*Counsel of Record

---



No. 85-4027

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

DAVID YASHON, M.D.,	)	
ET AL.,	)	ON APPEAL from
Plaintiffs-	)	the United
Appellants.	)	States District
	)	Court for the
v.	)	Southern
	)	District of
WILLIAM E. HUNT,	)	Ohio.
M.D., ET AL.,	)	
Defendants-	)	
Appellees.	)	

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Decided and Filed August 3, 1987

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Before: KENNEDY and MILBURN,  
Circuit Judges; and CONTIE, Senior  
Circuit Judge.

CONTIE, Senior Circuit Judge.  
Plaintiff David Yashon, M.D., appeals  
from the order of the district court  
granting judgment in favor of the  
defendants and dismissing his action  
brought under 42 U.S.C. §1983 to compel



his reinstatement to the attending medical staff at the Ohio State University Hospitals in Columbus, Ohio. The district court's order reentered a prior order of the court in which it had found that the defendants afforded plaintiff due process when they rejected his application for reappointment to the attending medical staff. On appeal, plaintiff claims that the Medical Staff Administrative Committee (MSAC) violated principles of administrative res judicata when, in rejecting his application, it considered charges which had been the subject of prior disciplinary proceedings. Plaintiff also argues that the administrative hearing held to consider his application did not comport with procedural due process. Plaintiff asserts six specific





procedural due process violations: (1) denial of the right to present witnesses and additional documentary evidence; (2) failure by the MSAC to render a written decision explaining its reasons for rejecting plaintiff's application; (3) lack of written standards governing consideration of plaintiff's application; (4) insufficient written notice of the charges asserted at the hearing; (5) denial of any prehearing discovery; and (6) denial of the assistance of counsel at the hearing. Plaintiff lastly contends that the MSAC's decision violated his substantive due process rights. For the reasons which follow, we affirm the judgment of the district court.



I.

This case, which is now before the court for the third time, has a lengthy factual and procedural history which we review here to facilitate a complete understanding of the present appeal. Plaintiff is a duly-licensed neurological surgeon and tenured professor of neurosurgery at the Ohio State University College of Medicine. Pursuant to University Hospitals bylaws, only University faculty members may be appointed to the attending medical staff of University Hospitals. Staff members are appointed for one-year terms and must file an application for reappointment at the end of each term. Pursuant to this procedure, plaintiff was continuously



on the attending medical staff from September, 1969 through June 30, 1981. Prior to June, 1981, plaintiff submitted his application for reappointment to Dr. Larry Carey, Chairman of the Department of Surgery, but Dr. Carey did not submit the application to the MSAC for consideration. Consequently, Dr. Carey prevented renewal of plaintiff's staff privileges. This was the most recent of several disciplinary actions or investigations initiated against plaintiff.

The first such action involved a detenurization proceeding based on the allegation that plaintiff engaged in "gross misconduct" by using another faculty member's name in a grant application without that faculty member's permission. Dr. Henry



Cramblett, then Dean of the College of Medicine, reversed the charge, observing that plaintiff's conduct was "serious" but did not alone warrant detenurization, especially since plaintiff had subsequently notified the National Institute of Health to withdraw the other faculty member's name from the grant application.

The second action was an attempt to remove plaintiff from the attending medical staff based on charges raised by Dr. Carey in late 1979. An Investigation Committee reviewed the charges and, finding them to be substantial and the cause of obvious disruption, recommended further review. A Grievance Committee subsequently reviewed the charges and issued a report finding no basis for charges of incompetency, no evidence of





disruptiveness caused by plaintiff, and unfair harassment by Dr. Carey. The Grievance Committee recommended that plaintiff be restored to his full medical staff privileges. The Grievance Committee's report was reviewed by Dr. Manuel Tzagournis, then Associate Dean of the College of Medicine. When Dr. Tzagournis asked the Grievance Committee to provide him with information explaining the basis for its conclusions, the Grievance Committee declined to do so. Dr. Tzagournis ultimately concluded that plaintiff's past conduct was disruptive and justified a "strong reprimand" but did not warrant curtailment of medical staff privileges. After plaintiff appealed the reprimand to an Executive Committee, Dr. Tzagournis told him that the Committee could confirm, reject, or



modify his decision to issue a reprimand. Plaintiff eventually abandoned his appeal.

The third prior action was initiated against plaintiff by Dr. Hunt, then Chief of Neurological Surgery Service. A four-physician committee found that plaintiff engaged in improper conduct when he removed a note written by Dr. Hunt from a patient's chart. The committee did not believe, however, that it was in a position to render a decision as to any illegality of plaintiff's conduct.

The fourth prior action was taken by Dr. Carey, who suspended plaintiff's admission and operating room privileges in May of 1980 because of the "Brumfield" incident. It was alleged that plaintiff failed to properly respond to a resident's request that he



come to the hospital to attend to a patient. Plaintiff's privileges were reinstated in July of 1980 pursuant to a decision of the Executive Committee.

Most of the charges involved in these prior disciplinary actions were relied upon by Dr. Carey as grounds for withholding plaintiff's application for reappointment to the medical staff.

On July 15, 1981, plaintiff filed the instant action against Dr. Carey, the individual members of the MSAC, and other University physicians and officials.<sup>1</sup> (Footnotes appear at the end of the text.) Plaintiff sought to compel his reinstatement to the attending medical staff and to enjoin further disciplinary actions against him.

On July 17, 1981, the district court entered a consent order whereby



the parties agreed that plaintiff would retain his medical staff privileges until plaintiff's request for injunctive relief was resolved. That same day, the court conferred with counsel for both parties and the parties ultimately agreed to submit plaintiff's application for reappointment to the MSAC for disposition in the same manner as other applications. The district court suggested that Dr. Carey and plaintiff each make a presentation to the MSAC concerning Dr. Carey's reasons for not recommending plaintiff's reappointment to the medical staff, but the court did not suggest or order that the MSAC conduct a "due process" hearing. The court told the parties that no counsel were to be present at the hearing.

Plaintiff subsequently received two





written notices of the hearing by letters from Dr. Tzagournis and Dr. Michael Whitcomb, chairman of the MSAC. Accompanying Dr. Whitcomb's letter was a copy of the letter Dr. Carey had written Dr. Tzagournis, listing the specific charges against plaintiff. Plaintiff also spoke with Drs. Tzagournis and Whitcomb by telephone prior to the hearing, and they both explained that they had no knowledge of any witnesses who might be called by Dr. Carey.

The MSAC hearing was held on September 1, 1981, with Dr. Whitcomb making the following opening statement:

Our purpose here this morning is to review Dr. Yashon's application or request for reappointment to the medical staff. . . . I would like to point out, this is not a court of law. We have no absolute set guidelines in terms of the proceedings



which we are compelled to follow, but our format will be such that I will ask [Dr. Carey] if he chooses and [Dr. Yashon] if he chooses to make some initial comments . . . and then for [Dr. Carey] to present specific reasons why he chose not to recommend [Dr. Yashon] to the staff and, as we go through the process, to allow [Dr. Yashon] to respond to those point by point.

Dr. Carey then gave his opening statements, explaining that he was going to present witnesses and evidence showing why plaintiff was an "undesirable member of this hospital staff." Dr. Carey also stressed:

I am in no position now, nor have I been in the past, to evaluate Dr. Yashon's competence as a neurosurgeon . . . [b]ut I believe I am in a position and have the responsibility of determining whether or not an individual in the Department of Surgery is competent to practice in this institution. That says little specifically about his competence as a physician.



It says something about his propriety as a member of the staff of a teaching hospital.

Plaintiff then made his opening statements, asserting that his work had been most satisfactory until Drs. Carey and Hunt began causing him problems in executing his duties. Plaintiff also raised several objections to the hearing's format, including the lack of notice of Dr. Carey's intention to call witnesses. Plaintiff stated:

I have asked Dr. Whitcomb and Dr. Tzagournis . . . [a]re there going to be any witnesses? No witnesses. Now I find out there are going to be witnesses. I don't know what's going on. I will have to face them, but I am not prepared. . . . I object to that.

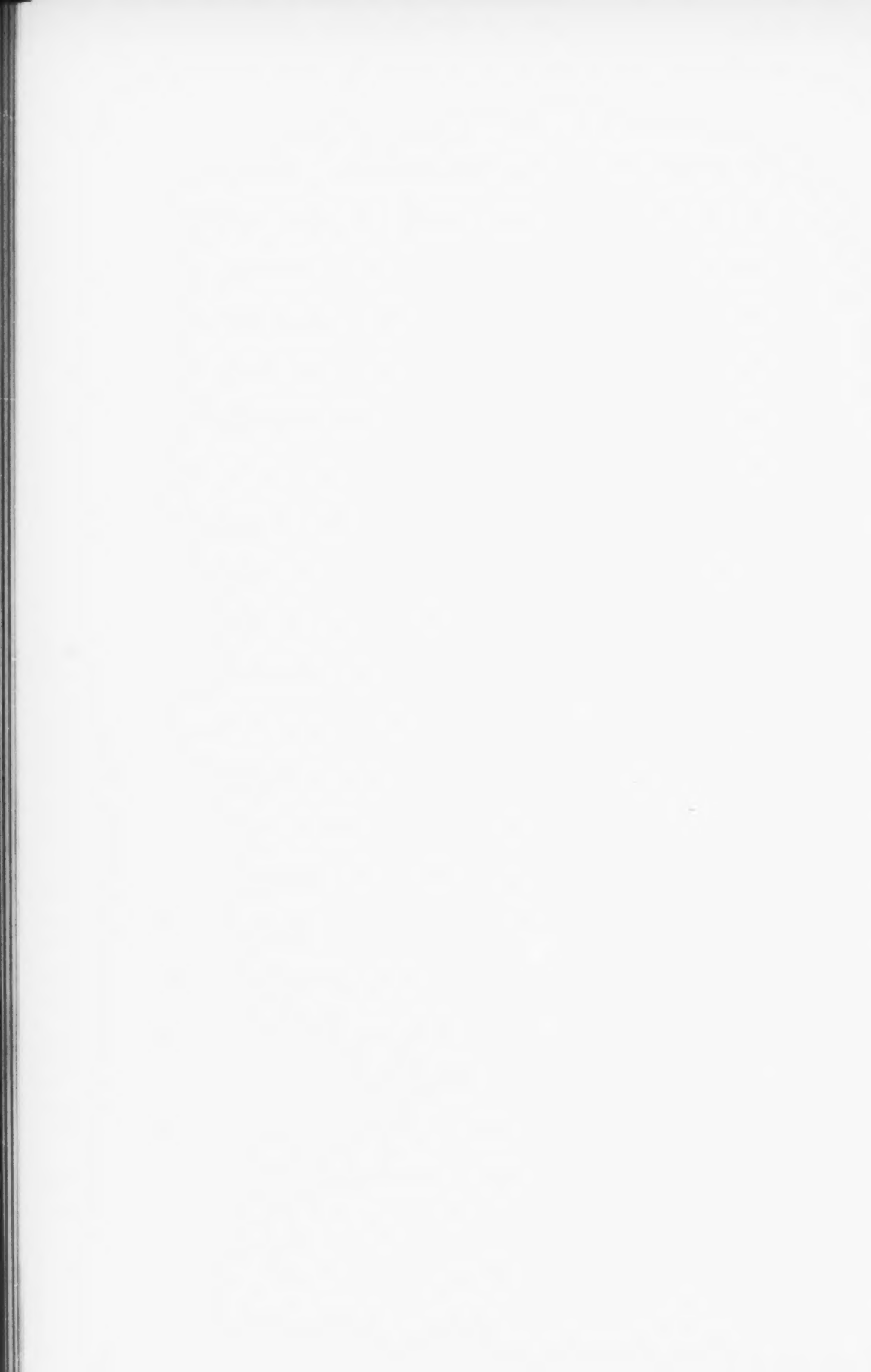
Although plaintiff objected to the presentation of witnesses by Dr. Carey, he did not ask for an opportunity to



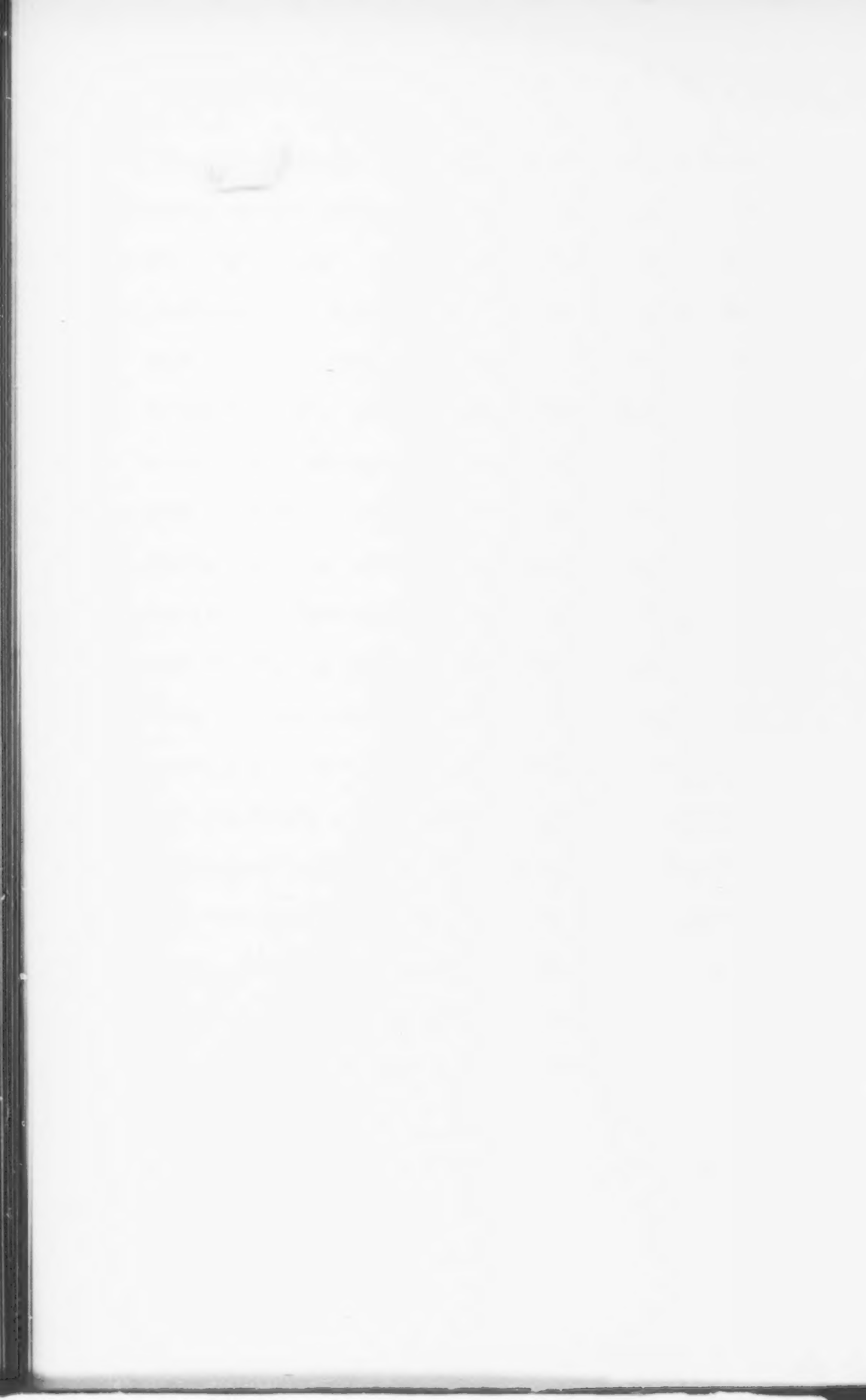
present his own witnesses. Plaintiff also objected that most of the grounds being relied upon by Dr. Carey had previously been found meritless by the Grievance Committee, that he had not been given an adequate opportunity to prepare responses to the grounds not previously addressed by the Grievance Committee, and that as a tenured faculty member he could only be removed from the attending medical staff by a detenurization proceeding.

Dr. Carey ultimately presented thirteen witnesses at the hearing. Plaintiff was afforded the opportunity to cross-examine each of them, and members of the MSAC were permitted to ask questions as well. One of the witnesses was Dr. Warren Leimbach, who stated that he received three complaints from residents about





plaintiff's coverage of the residency program. Specifically, one first-year resident told him that she had to perform an operation without plaintiff's presence and that the operation had less than satisfactory results. Plaintiff responded to this testimony by asserting that the resident never performed an operation without him being present. Karen Nedelka, who was the head nurse in the neurosurgical intensive care unit, also testified. She related two specific incidents of plaintiff's failure to properly respond to patient treatment situations, one of which involved the care of a Mrs. Brumfield. Dr. Rees Freeman then testified and discussed the circumstances of the Brumfield case in more detail, explaining how plaintiff failed to properly respond to



the situation after being called several times. Dr. Freeman was a resident at the time. Dr. Freeman also described plaintiff's failure to respond to the other emergency situation described by Nedelka. Dr. Freeman and several other residents testified that they were uncomfortable with plaintiff's performance as a teacher and his practice of neurosurgery. Finally, various witnesses discussed the prior disciplinary actions initiated against plaintiff and the grounds for those actions.

At the close of the hearing, members of the MSAC voted thirteen to four to reject plaintiff's application for reappointment. The MSAC did not, however, render any written decision detailing its findings.



On September 18, 1981, the defendants moved the district court to vacate the consent order providing for plaintiff's continued membership on the attending medical staff pending the MSAC hearing and disposition. The defendants also requested the court to enter summary judgment in their favor, urging that the MSAC hearing afforded plaintiff all the process he was due.

In an extensive opinion filed on February 26, 1982, the district court vacated its prior consent order and granted the defendants' motion for summary judgment, finding no due process violations arising from the MSAC hearing. The court also rejected plaintiff's claim that principles of administrative res judicata attached to the prior disciplinary proceedings instituted against him and precluded



the MSAC from relying on the same charges raised in those prior proceedings.

Plaintiff then pursued his first appeal to this court. On appeal, we declined to reach the merits of plaintiff's procedural due process arguments, holding instead that the district court erred by failing to address the threshold inquiry of whether plaintiff had a protected property or liberty interest in his position on the attending medical staff. Yashon v. Hunt, 696 F.2d 468 (6th Cir. 1983). Noting that the requirements of procedural due process apply only to constitutionally protected interests, this court concluded that a remand was necessary to allow the district court to make a





determination on the protected interest question. Id. at 470.

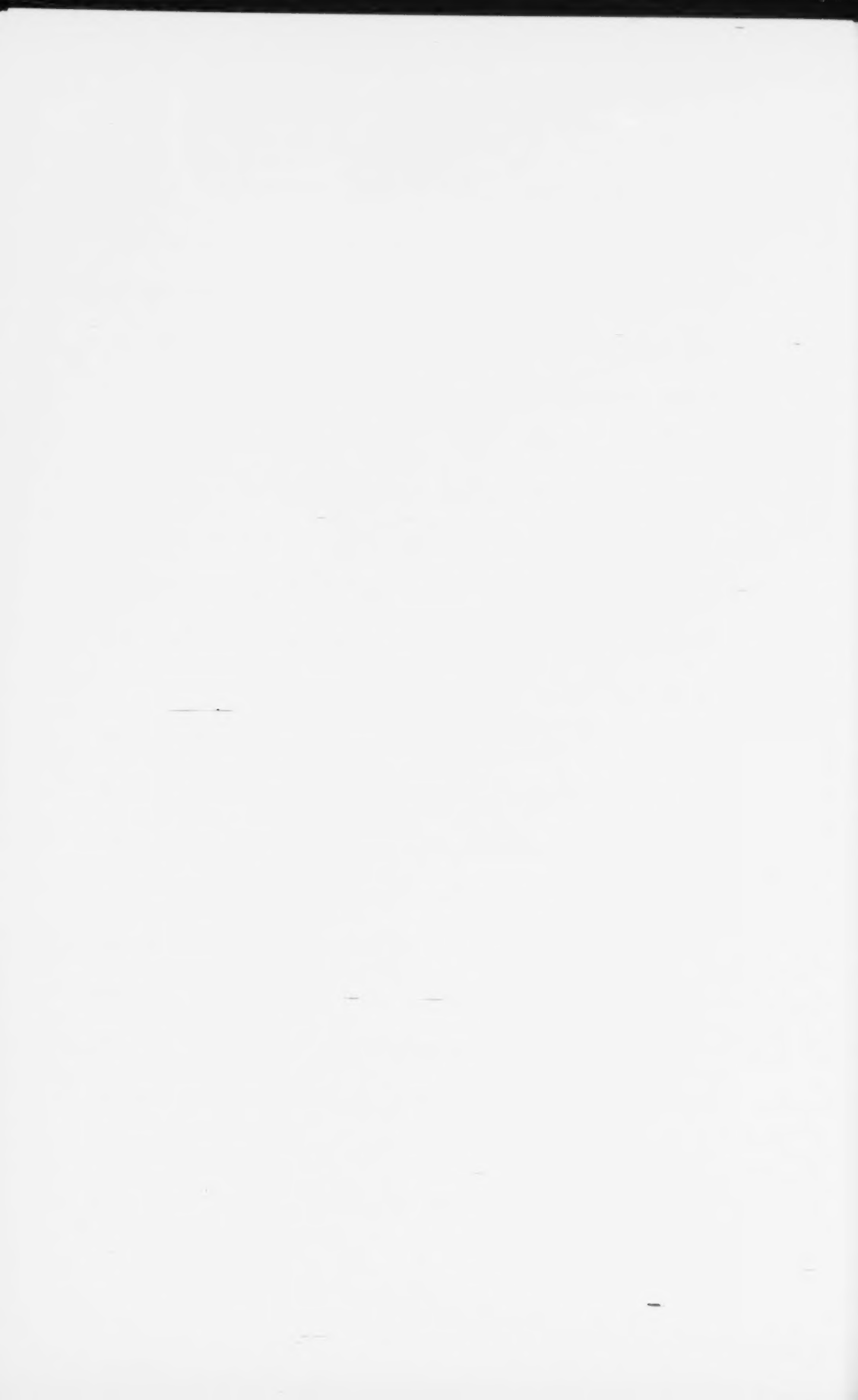
On remand, plaintiff requested discovery because the protected interest issue had not been addressed by either party. The district court denied this request, determining that the issue could be resolved on the basis of the original record. The court ultimately found that plaintiff had no protected property or liberty interest in his position on the attending medical staff, and again granted summary judgment in favor of the defendants.

Plaintiff again brought an appeal to this court and we again vacated the judgment of the district court and remanded for further consideration. Yashon v. Gregory, 737 F.2d 547 (6th Cir. 1984). We stated two grounds for



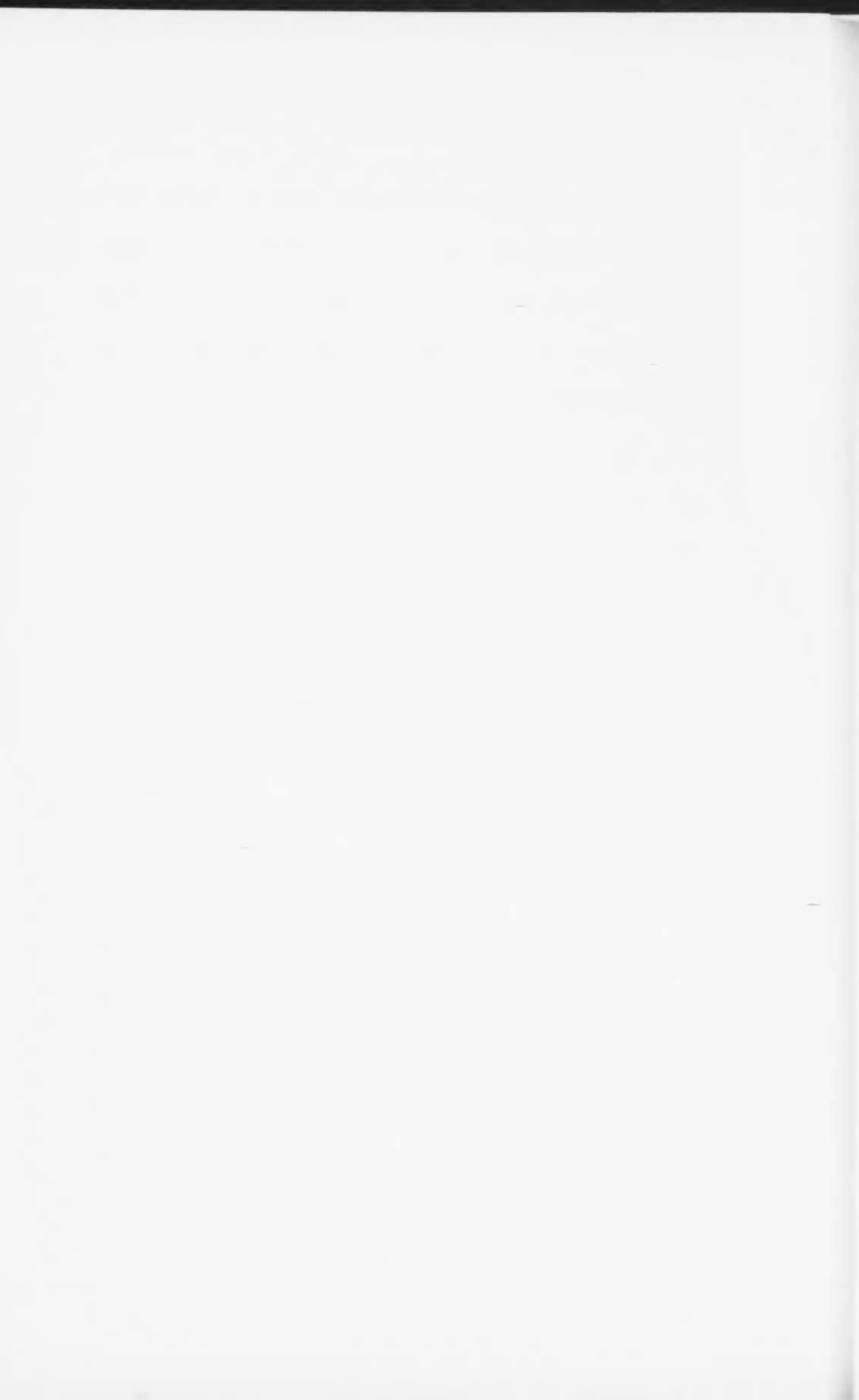
the decision to remand: (1) the district court improperly entered summary judgment sua sponte without giving plaintiff appropriate notice or the opportunity to respond, id. at 552-53; and (2) the district court erred in denying plaintiff's request for discovery because there were disputed issues of material fact which were subject to discovery. Id. at 553-56.

On remand for the second time, the parties stipulated that plaintiff had a constitutionally protected property interest in his membership on the attending medical staff. Accordingly, the district court issued an opinion and order on November 6, 1985, finding that plaintiff had a protected property interest in continued staff privileges. Since plaintiff had such a



protected interest, the court observed that plaintiff was "entitled to a due process hearing in connection with the decision on his annual reappointment to the medical staff."

On November 18, 1985, the district court resolved the due process issues. The court decided, and counsel agreed, that it should reenter its original decision denying plaintiff's claims. In accordance with that prior decision, the court again entered judgment in favor of the defendants, from which plaintiff now appeals. Accordingly, the instant appeal focuses on the district court's 1982 decision upholding the propriety of the MSAC hearing and the MSAC's decision to reject plaintiff's application for reappointment to the attending medical staff.



## II.

Plaintiff first argues that principles of administrative res judicata precluded the MSAC from considering charges which had already been raised in prior disciplinary proceedings. As the district court acknowledged in its decision, most of the charges alleged by Dr. Carey in the proceedings before the MSAC had also been asserted in the previous disciplinary actions initiated against plaintiff. The four prior separate proceedings taken against plaintiff resulted in: (1) a "strong reprimand" but no removal from the medical staff; (2) a finding of improper conduct; (3) dismissal of a detenurization complaint; and (4) reinstatement of





operating privileges which had been suspended. Plaintiff contends that principles of res judicata attached to these prior proceedings and therefore barred reconsideration of the charges on which the proceedings were based. Plaintiff primarily relies on United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966), which stated that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata. . . ." Although Utah Construction and other cases cited by plaintiff addressed the preclusive effect of administrative proceedings on subsequent judicial actions, and the instant case presents the slightly



different question of whether subsequent administrative proceedings are barred by prior administrative proceedings, plaintiff nevertheless urges that the principles are equally applicable here because each of the previous administrative actions fully addressed the merits of the charges and fully exonerated him of those charges.

We are unpersuaded that the MSAC was precluded from considering the charges which had been reviewed in the other disciplinary proceedings. Determinations made in administrative proceedings will generally be given preclusive effect only if the parties had a full and fair opportunity to litigate the matters involved, see Utah Construction, 384 U.S. at 422; City of Pompano Beach v. Federal Aviation Auth., 774 F.2d 1529, 1538-39 n. 10



(11th Cir. 1985), and if the proceedings culminated in a definitive resolution of the matters. Neither of these requirements are satisfied in this case. None of the former proceedings reached a point whereby the parties were given a full opportunity to litigate the charges brought against plaintiff. In each instance, the administrative processes stopped short of the type of formal hearing which was held before the MSAC, and to which principles of res judicata could attach. Furthermore, several of the former proceedings did not definitively resolve the charges asserted against plaintiff in that he was not completely exonerated of improper conduct. Accordingly, we agree with the district court that the previous administrative proceedings should not be given



preclusive res judicata effect and that the MSAC therefore was not barred from considering the charges raised in those proceedings.

### III.

Plaintiff asserts that six specific —procedural due process violations arose out of the MSAC hearing. Our review of these due process arguments is governed by several general principles. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). However, the overall concept of due process of law is a flexible one, and therefore the type of procedural





protections required in a particular situation depends largely upon the circumstances of that situation. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In determining when a particular procedure is required, three factors should generally be considered:

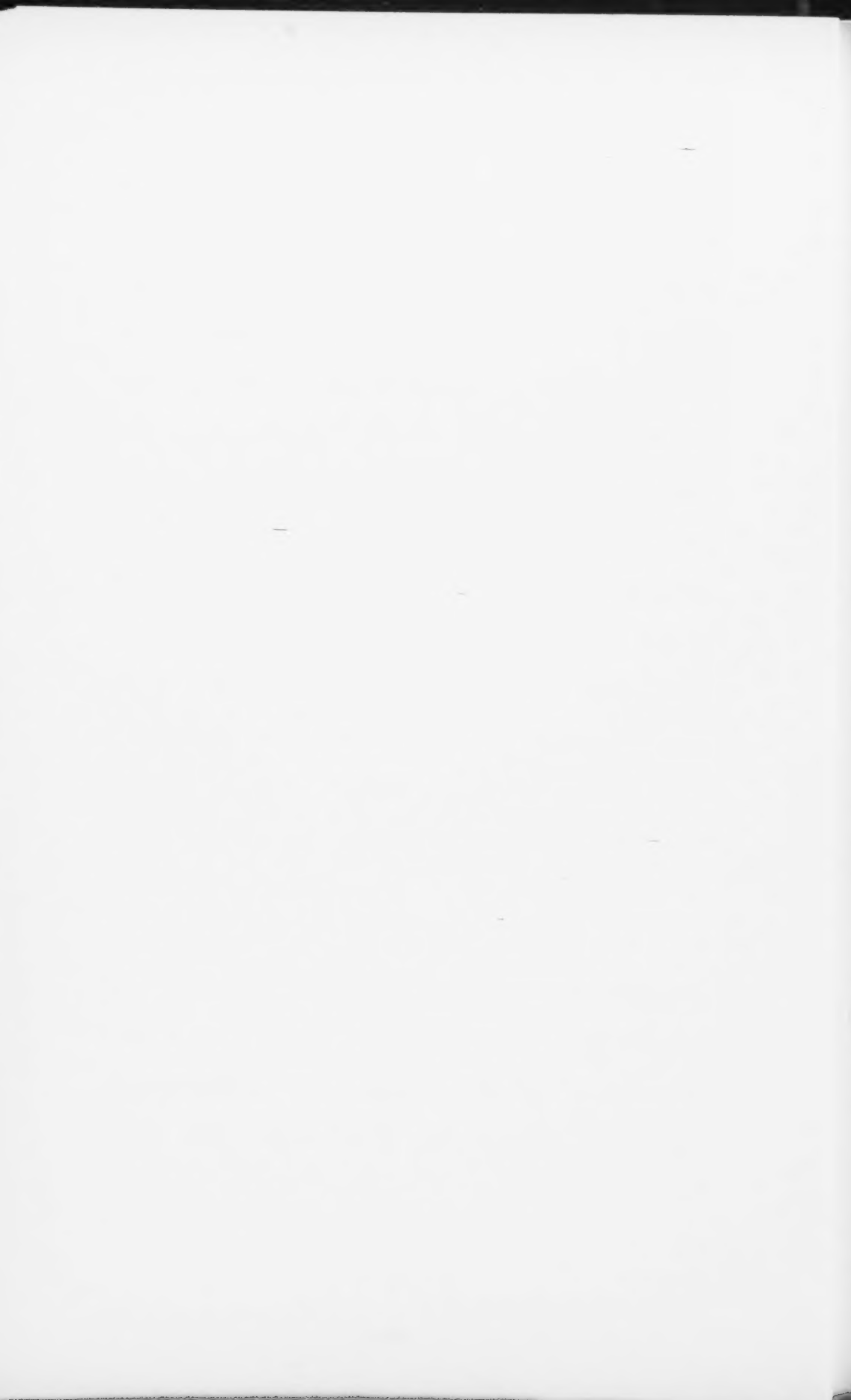
First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

It is obvious in the instant case that plaintiff and University Hospitals each had important interests at stake



in the MSAC hearing. Plaintiff had a significant interest in being reappointed to the attending medical staff in order to maintain his professional reputation and his income. On the other hand, it was important to University Hospitals to retain only competent and highly compatible physicians on its medical staff. Hospitals have an important "interest in quickly dealing with incompetence and debilitating personal frictions," in order to ensure "[e]ffective performance by physicians on the staff . . . whose tasks require a high degree of cooperation, concentration, creativity, and the constant exercise of professional judgment." Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 368 (9th Cir. 1976).



We must weigh these valid interests of each of the parties in considering the sufficiency of the process afforded plaintiff at the MSAC hearing. In doing so, however, we must also bear in mind that the scope of our review is fairly narrow. A federal court's review of disciplinary actions taken against a physician by a hospital is generally limited to determining whether the procedures used violated any federal rights and whether the administrative body was presented with substantial evidence to support its ultimate action. Lew v. Kona Hosp., 754 F.2d 1420, 1425 (9th Cir. 1985); Woodbury v. McKinnon, 447 F.2d 839, 846 (5th Cir. 1971). It is simply not our function to review the merits of the charges against a physician, Kona Hospital, 754 F.2d at 1425, and we will



generally afford great deference to "the decision of a hospital's governing body concerning the granting of hospital privileges." Laje v. R. E. Thomason Gen. Hosp., 564 F.2d 1159, 1162 (5th Cir. 1977), cert. denied, 437 U.S. 905 (1978). Mindful of these general principles, we turn to the specific procedural due process arguments raised by plaintiff.<sup>2</sup>

#### A. Right to Call Witnesses

Plaintiff first argues that the defendants violated his procedural due process rights by denying him the right to present witnesses and additional documentary evidence on his own behalf. Plaintiff contends that there is a well-established constitutional right to call witnesses in proceedings





before an administrative factfinder. For this proposition, plaintiff relies on two Sixth Circuit cases which did not involve the issue of a physician's medical staff privileges, Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270, 273 (6th Cir. 1985) (discharged civil servant permitted to call witnesses at post-termination Loudermill hearing see Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)), and NLRB v. Prettyman, 117 F.2d 786, 790 (6th Cir. 1941) (in hearing under National Labor Relations Act, employer may produce evidence and witnesses to refute unfair labor practice charges).

We have found no decisions holding that a physician is constitutionally entitled to call witnesses in a proceeding to determine whether the



physician should be granted staff privileges. Some cases have approved proceedings where no witnesses were called, see, e.g., Woodbury, 447 F.2d at 844, while other cases have approved procedures allowing a physician to call witnesses, see, e.g., Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512, 519 (4th Cir. 1974). Even in the latter instance, however, it was not held that the ability to call witnesses was constitutionally mandated. Still other cases have simply held that a physician has the right to rebut the evidence against him and cross-examine adverse witnesses. See, e.g., Christhilf v. Annapolis Emergency Hosp. Ass'n., Inc., 496 F.2d 174, 178-79 (4th Cir. 1974).

We conclude that no procedural due process violation occurred when the



MSAC rendered its decision without hearing from any witnesses testifying on plaintiff's behalf. Several factors are influential in reaching this conclusion.

First, plaintiff mischaracterizes the situation when he claims that the defendants refused to allow him the right to call witnesses, since he never requested permission to call his own witnesses. At the outset of the MSAC hearing, plaintiff objected to the presentation of witnesses by Dr. Carey but he did not ask to present his own witnesses nor did he seek a continuance for the purpose of obtaining witnesses. Instead, he agreed to proceed with the hearing and respond to the witnesses called by Dr. Carey. Plaintiff therefore did not claim before the MSAC that he was entitled to



call witnesses on his own behalf. Accordingly, there was no outright refusal by the defendants to allow plaintiff to call his own witnesses. For us to find a procedural due process violation under these circumstances, we would have to hold that plaintiff was constitutionally entitled as a matter of law to be given the opportunity to call his own witnesses. We believe that adoption of such a constitutional requirement is unwarranted, particularly since due process of law is a flexible concept which requires different procedural protections depending on the situation. Morrissey v. Brewer, 408 U.S. at 481.

Second, plaintiff has never shown what additional evidence or testimony he could have presented at the hearing had he been given the opportunity to do





so. The district court below observed that plaintiff had not, either at the hearing or in his filings with the district court, "proffered the name of any witness he would have called." In the absence of any such proffer, we have no basis for concluding that plaintiff was prejudiced by not having any witnesses testify on his behalf.

Third, we are satisfied that the essential requirement of procedural due process was satisfied here; that is, plaintiff was afforded a meaningful opportunity to be heard. Throughout the hearing, plaintiff had the means to rebut the evidence presented against him, as he was permitted to thoroughly cross-examine the witnesses called by Dr. Carey and to make statements on his own behalf in response to the witnesses' testimony.



Finally, with respect to plaintiff's complaint that he was denied the opportunity to present documentary evidence, the record establishes that he in fact submitted documents at the hearing and that he read extensively from those documents during the hearing. Furthermore, plaintiff did not proffer any additional relevant evidence to the district court which he was prevented from presenting at the hearing. Accordingly, plaintiff again has not shown how he was prejudiced.

In sum, we are unpersuaded that the interests of the parties in this case, as analyzed under Mathews v. Eldridge, are such that plaintiff was entitled to the additional procedural due process safeguards of presenting witnesses or additional evidence on his own behalf.



## B. Lack of Written Decision

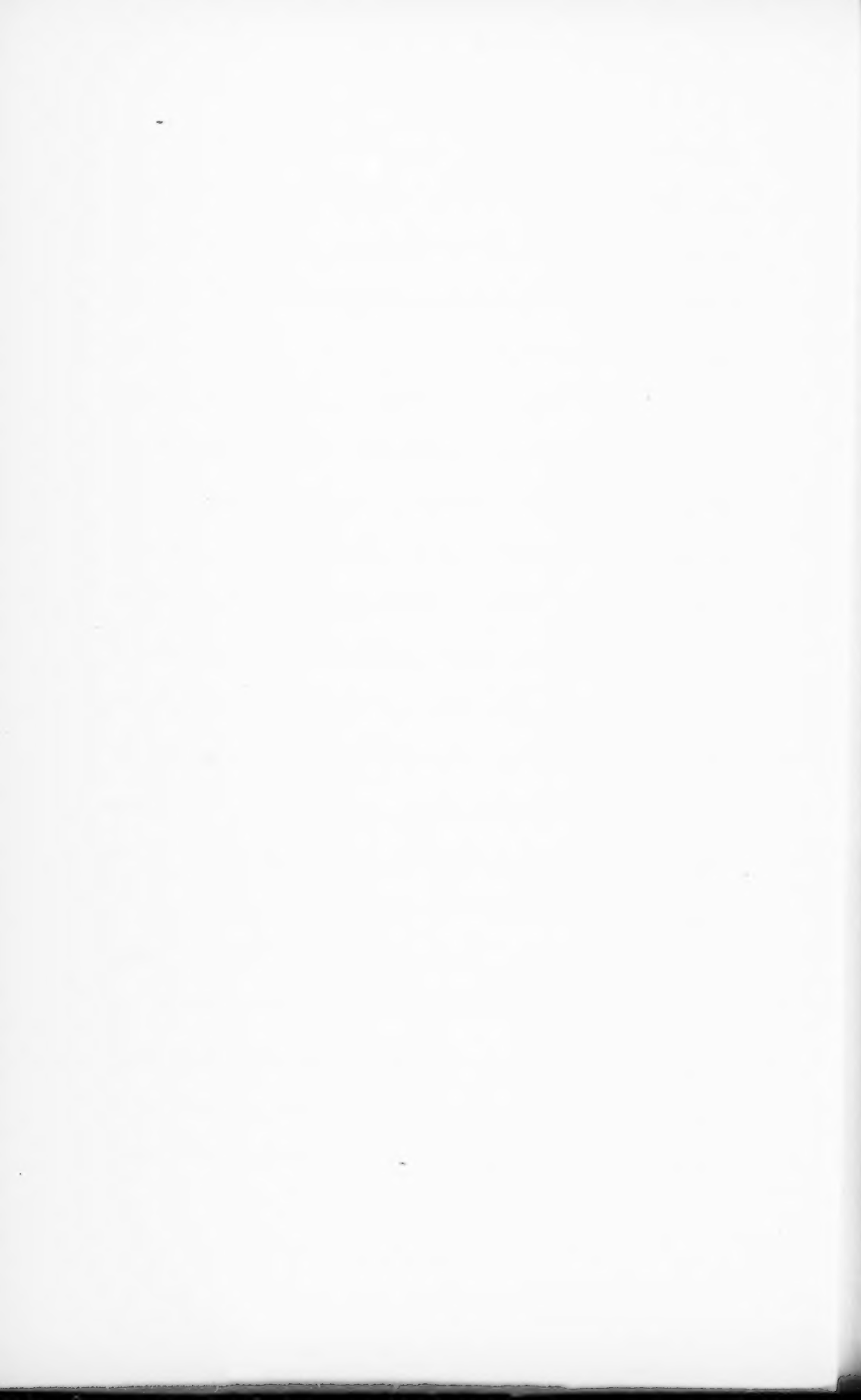
Plaintiff's second procedural due process claim focuses on the lack of any formal, written decision by the MSAC. Plaintiff contends that the MSAC's failure to render a written decision setting forth its findings and reasoning violates due process because it prevents effective review of the decision and the grounds supporting it. Plaintiff refers the court to the due process concerns addressed by the Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). In Wolff, the Court held that in prison disciplinary decisions "there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action." Id. at 564



(quoting Morrissey v. Brewer, 408 U.S. at 489). Requiring written records of disciplinary proceedings helps to "insure that administrators, faced with possible scrutiny . . . will act fairly." Id. at 565. Without such written records, inmates would be at a disadvantage when attempting to propound their own cause or defend themselves. Id. This Circuit has also observed that the failure to issue a written decision in a prison disciplinary proceeding inhibits effective appellate review of that decision. Franklin v. Aycock, 795 F.2d 1253, 1256 (6th Cir. 1986).

Plaintiff cites to no case authority for the proposition that an informal hospital decision-making body must issue a written decision explaining its findings and rationale





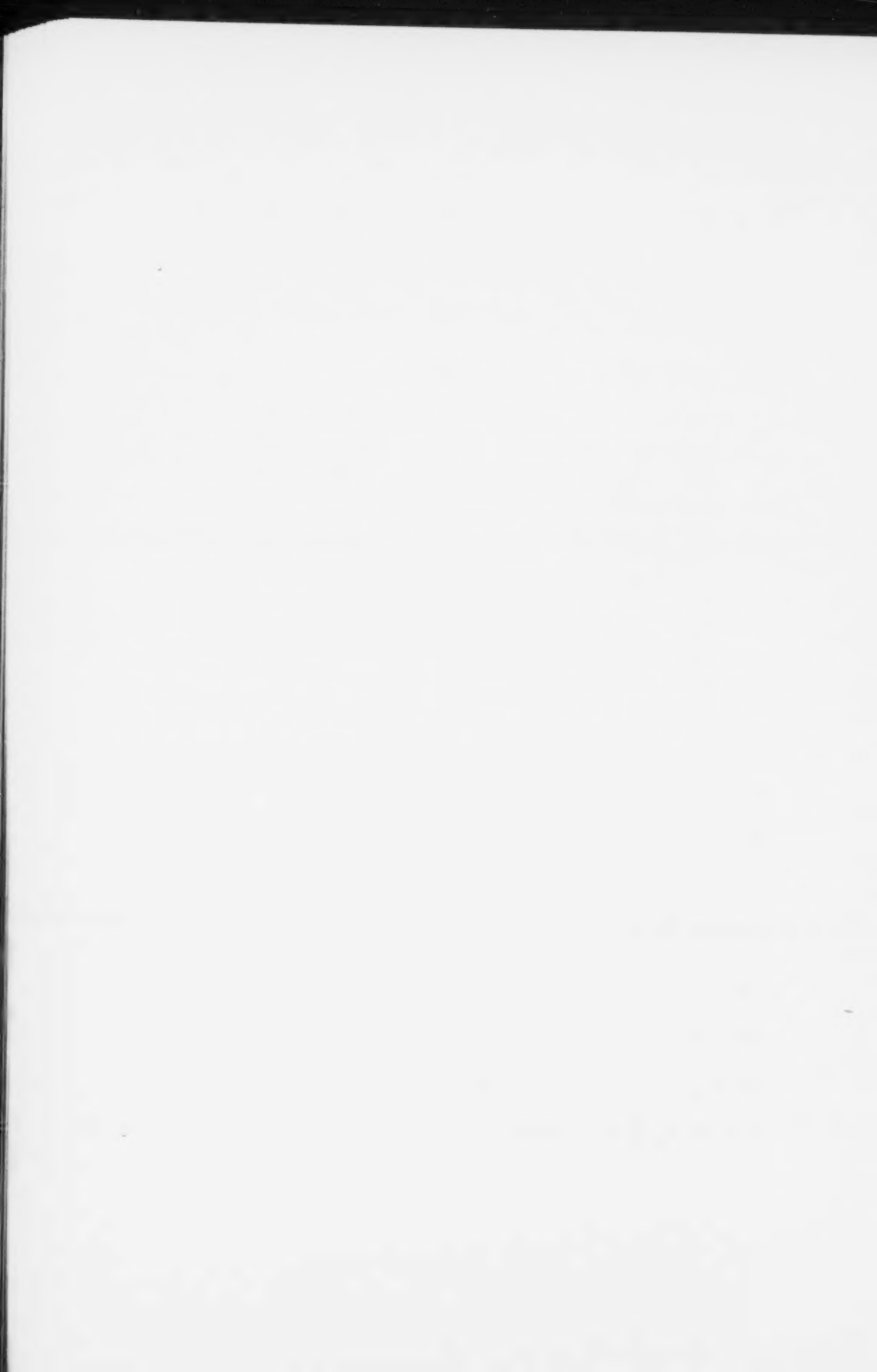
for denying a physician attending staff privileges, and we decline to adopt such a rule under these circumstances. The primary concern of the requirement of a written decision is to provide a sufficient record for a reviewing body to verify that the decision was founded on proper grounds. In the instant case, it was the district court's duty to determine whether the MSAC based its decision "only [on] those matters which are reasonably related to the operation of the hospital." Sosa v. Board of Managers of the Val Verde Memorial Hosp., 437 F.2d 173, 176-77 (5th Cir. 1971). The district court observed that although its inquiry would have been easier had there been a written decision, the absence of a written decision did not preclude effective review because there was a complete



transcript of the MSAC proceedings. The court was therefore able to thoroughly examine the written record and conclude as follows:

[I]n view of the Court's extensive review of the administrative record and its determination that there was sufficient evidence to support many of Dr. Carey's charges, a number of which were not even challenged, the Court cannot find that Dr. Yashon was unfairly prejudiced . . . by . . . the committee's failure to render a written decision as to which charges were meritorious.

Our review of the hearing transcript likewise reveals that the MSAC relied on appropriate considerations in rendering its decision. We accordingly agree with the district court's analysis and hold that the MSAC's failure to issue a written decision did



not violate plaintiff's due process rights.

### C. Absence of Governing Standards

Plaintiff next argues that procedural due process required the adoption of express standards governing the denial of an application for reappointment to the medical staff. No such established standards existed when the MSAC rendered its decision. According to plaintiff, this absence of governing standards violated his due process rights because it gave the MSAC unfettered and arbitrary discretion to deny his application for any reason.

We disagree. The pertinent question is whether the evidence relied on by the MSAC was reasonably related to the operation of a hospital and its



attending medical staff. So long as it is based on such proper grounds, the decision to deny a physician's application for reappointment is within the discretion of the MSAC. As we held above, we are satisfied that the MSAC based its decision on appropriate considerations. Accordingly, the lack of established standards does not render the MSAC's decision arbitrary and therefore violative of due process. We are not persuaded otherwise by the cases relied upon by plaintiff since they involve decisions of government agencies and the settled requirement that they be made within established guidelines. See, e.g., White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976) (administrator of welfare program must establish written





standards governing eligibility for welfare assistance).

#### D. Adequacy of Written Notice

Plaintiff also argues that he received inadequate notice of the charges which would be brought against him at the hearing. He claims that the notice of charges contained in Dr. Carey's letter to Dr. Tzagournis, a copy of which plaintiff received from Dr. Whitcomb, was not sufficiently specific to enable him to prepare his defense. In support of his argument, plaintiff relies on a district court decision which held that a physician who had his hospital staff privileges terminated was entitled to "a detailed, written statement of the grounds upon which non-renewal of his staff



membership was being considered, specifying the cases in which his professional performance was challenged, and stating in reasonable fullness the nature of the criticism in each case." Suckle v. Madison Gen. Hosp., 362 F.Supp. 1196, 1211 (W.D. Wis. 1973), aff'd on other grounds, 499 F.2d 1364 (7th Cir. 1974).

This argument is without merit. Notice in this type of informal setting need only be specific enough to enable the individual to respond to the charges raised against him; it need not rise to the level of specificity required of a criminal indictment. See, Woodbury, 447 F.2d at 844. The written notice of charges contained in Dr. Carey's letter gave plaintiff sufficient notice under this standard. Furthermore, plaintiff has



acknowledged, and the district court found, that he was already familiar with all but one of the charges asserted by Dr. Carey, since they were the subject - of prior proceedings. Written notice of specific charges is not required where past events or discussion have provided a physician with notice of the charges against him. Ong v. Tovey, 552 F.2d 305, 308 (9th Cir. 1977). Accordingly, we find no procedural due process violation arising from the notice afforded plaintiff.

#### E. Entitlement to Pre-Hearing Discovery

Plaintiff argues that he was entitled to pre-hearing discovery, which he was denied in violation of his procedural due process rights. While



some courts have permitted limited forms of discovery in similar situations, see Christhilf, 496 F.2d at 180 (physician or his counsel given opportunity on remand to "inspect or copy all documents in the hospital's possession bearing on each charge"), there is no constitutional right to pre-hearing discovery under these circumstances. The primary concern is to ensure that plaintiff had an adequate opportunity to prepare or develop his defense to the charges leveled against him. In light of plaintiff's familiarity with the charges, the ongoing nature of the controversy between he and the defendants, and plaintiff's responsiveness to the matters raised at the hearing, we are satisfied that this concern was met. See Klinge v.

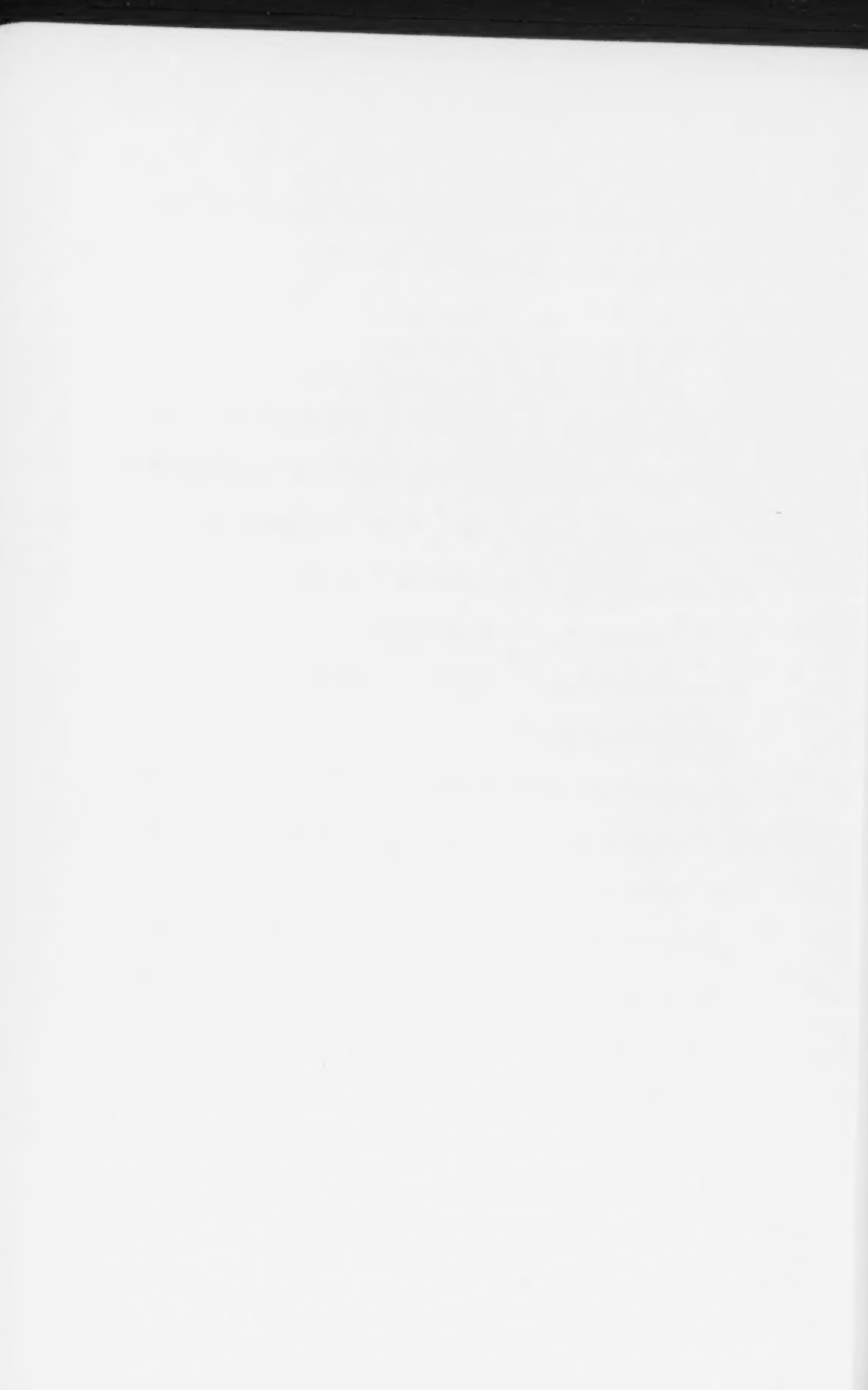




Lutheran Charities Ass'n., 523 F.2d 56,  
63 (8th Cir. 1975).

#### F. Assistance of Counsel

The last specific procedural due process argument asserted by plaintiff is that he had the right to be represented by counsel at the MSAC hearing. Although plaintiff acknowledges that there is no constitutional right to the presence of counsel at all administrative hearings, he contends that the absence of counsel in this case increased the "risk of an erroneous deprivation of [his] interest." Mathews v. Eldridge, 424 U.S. at 335. Plaintiff therefore concludes that the assistance of counsel was required to meet notions of fairness. He also again relies on the



statements made by this court in Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270, 273 (6th Cir. 1985) (in post-termination Loudermill type hearings, discharged civil servants have the right "to have the assistance of counsel"). Plaintiff urges this court to extend the right to counsel to proceedings held to evaluate a physician's application for membership on a hospital's attending medical staff.

This we decline to do. This Circuit has already held that an individual is not entitled to the assistance of counsel in informal university administrative proceedings. See Crook v. Baker, 813 F.2d 88, 99 (6th Cir. 1987); Frumkin v. Kent State Univ., 626 F.2d 19, 21 (6th Cir. 1980). Furthermore, the parties here



had originally agreed in their proceedings before the district court that no counsel would be present at the hearing. Finally, we believe the district court properly concluded that plaintiff was not prejudiced by the absence of counsel. The district court reasoned:

Where, as here, the record shows that Dr. Yashon fully participated at the hearing, that he was conversant with all of the charges made by Dr. Carey, and that he was competent at cross-examination, the Court concludes that it is unlikely that the presence and participation of counsel on Dr. Yashon's behalf would have provided a procedure less likely to have resulted in erroneous findings of fact.

This analysis is persuasive and illustrates that the lack of counsel under these circumstances did not increase the "risk of an erroneous



deprivation of [plaintiff's] interest." Mathews, 424 U.S. at 335. Thus, due process did not require that plaintiff be assisted or represented by counsel at the hearing. Cf. Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970) (welfare recipients entitled to a hearing before termination of their benefits and, if they have counsel, are entitled to have counsel cross-examine witnesses at the hearing).

G. Other Procedural Due Process Concerns

Apart from the specific procedures which plaintiff believes were essential to comply with due process, there are other general aspects of the MSAC hearing which plaintiff contends rendered the hearing fundamentally unfair and therefore violative of due





process. Plaintiff complains that the format of the hearing exceeded the district court's suggestion to the parties that Dr. Carey and the plaintiff each make oral presentations of their cases. In plaintiff's opinion, the MSAC ignored this "directive" of the district court by permitting Dr. Carey to call thirteen witnesses. Plaintiff also raises a form of conflict of interest or unfair bias argument, arguing that Dr. Carey and the members of the MSAC had mutual interests even though they had assumed the separate roles of prosecutor and neutral arbiter, respectively. As an indicia of their mutual interests, plaintiff cites to the fact that the same legal counsel represents Dr. Carey and the MSAC members in this and other actions. Plaintiff believes that the



close relationship between Dr. Carey and the MSAC members tainted the propriety of the MSAC hearing under the general principle that the roles of judge and prosecutor should not be intertwined. See In re Murchison, 349 U.S. 133 (1955).

These arguments, and other related arguments raised by plaintiff, do not convince us that the proceedings were fundamentally unfair. The defendants did not improperly exceed any "directive" of the district court because the court issued no order or mandate; it merely made general format suggestions to the parties which were essentially followed. There was also no improper mixing of the roles of prosecutor and judge. Dr. Carey did not participate either in the deliberations or in the ultimate



decision of the MSAC. Thus, the principles of Murchison were not violated. Cf. Hoberman v. Lock Haven Hosp., 377 F.Supp. 1178, 1186 (M.D. Pa. 1974) (due process violated where physician who filed charges and presented evidence against another physician also participated in the deliberations and decision on the charges). A person is entitled, as a general principle of due process, to have his cause heard before an impartial and neutral tribunal. Marshall v. Jerrico, Inc., 446 U.S. 233, 242 (1980). Since we are satisfied that the defendants took appropriate steps to ensure "the appearance and reality of fairness at the MSAC hearing," id., we conclude that this general principle was not violated. As succinctly stated by the



district court, "on this record, the court cannot conclude that the procedural irrègularities raised by Dr. Yashon rendered the hearing and its accompanying procedural protections fundamentally unfair."

#### IV.

Plaintiff lastly argues that the MSAC's decision to reject his application for reappointment to the medical staff violated substantive due process. To withstand substantive due process scrutiny, a hospital's decision to deny staff privileges "must be untainted by irrelevant considerations and supported by substantial evidence to free it from arbitrariness, capriciousness, or unreasonableness." Woodbury, 447 F.2d at 842. Although





plaintiff argues that the issue of his disruptiveness or unprofessional behavior was not reasonably related to the operation of University Hospitals, we have already recognized that a physician's unprofessional conduct, incompatibility and lack of cooperation on a hospital staff are appropriate considerations for denying staff privileges. Stretten, 537 F.2d at 368. Because the evidence presented to the MSAC tended to show that plaintiff was disruptive, that he was not compatible with other staff members, and that he had engaged in certain unprofessional improprieties, we are satisfied that there is substantial relevant evidence supporting the MSAC's decision to deny plaintiff's application for reappointment to the medical staff. We therefore hold that



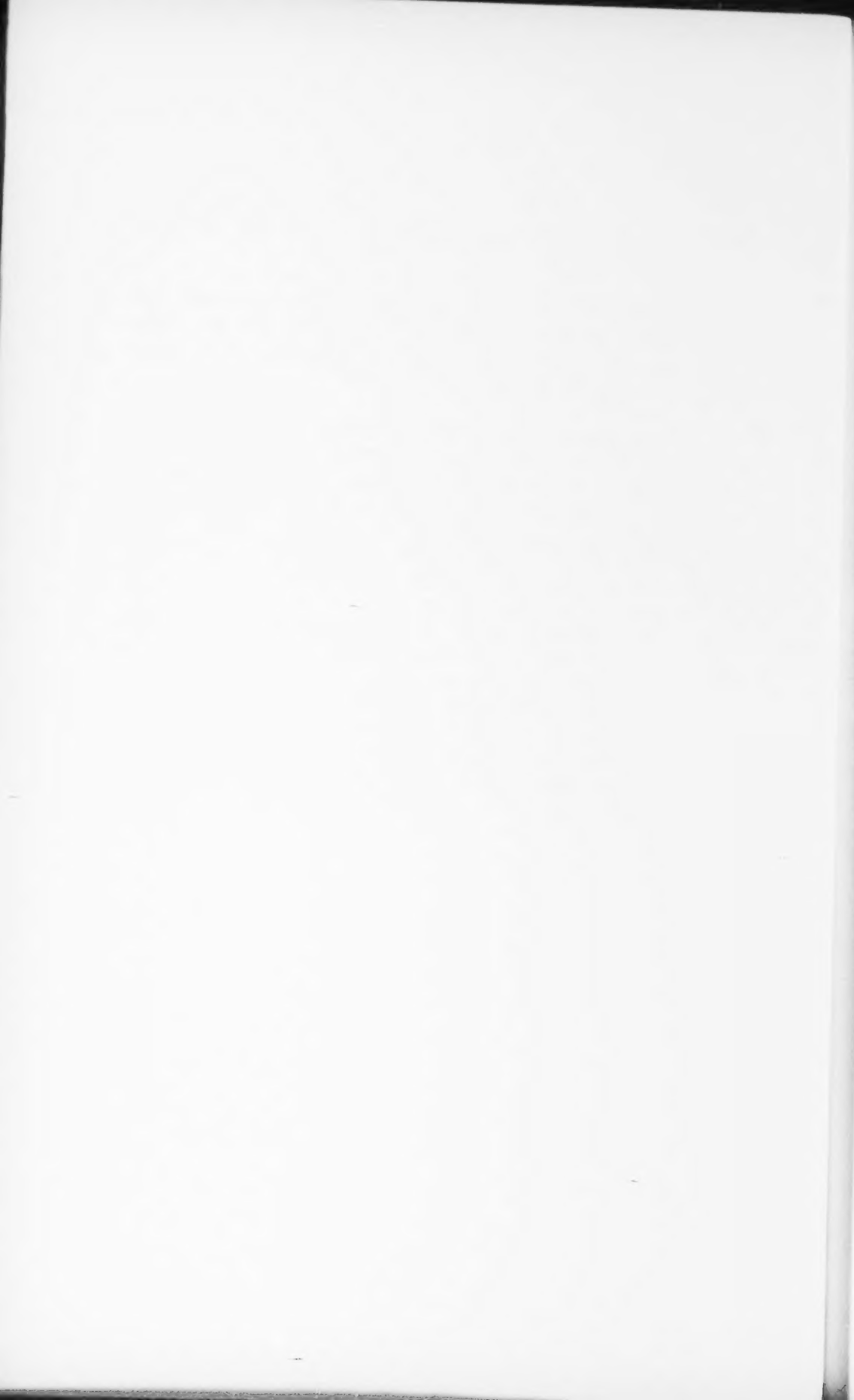
plaintiff's substantive due process rights were not violated.

Accordingly, for the reasons set forth above, the judgment of the district court is AFFIRMED.



### FOOTNOTES

- 1 Plaintiff was originally joined in this action by Dr. Thomas Hawk, but Dr. Hawk is not a party to the present appeal.
- 2 Of course, the requirements of procedural due process apply only where protected property or liberty interests are deprived. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Pursuant to the parties' stipulation, the district court below entered an order finding that plaintiff had a protected property interest in his membership on the attending medical staff. The defendants have not appealed that finding. Accordingly, it is not disputed that the requirements of procedural due process apply with respect to the MSAC hearing.



IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

DAVID YASHON, M.D., et al,

Plaintiffs

vs.

C-2-81-867

WILLIAM E. HUNT, M.D., et al,

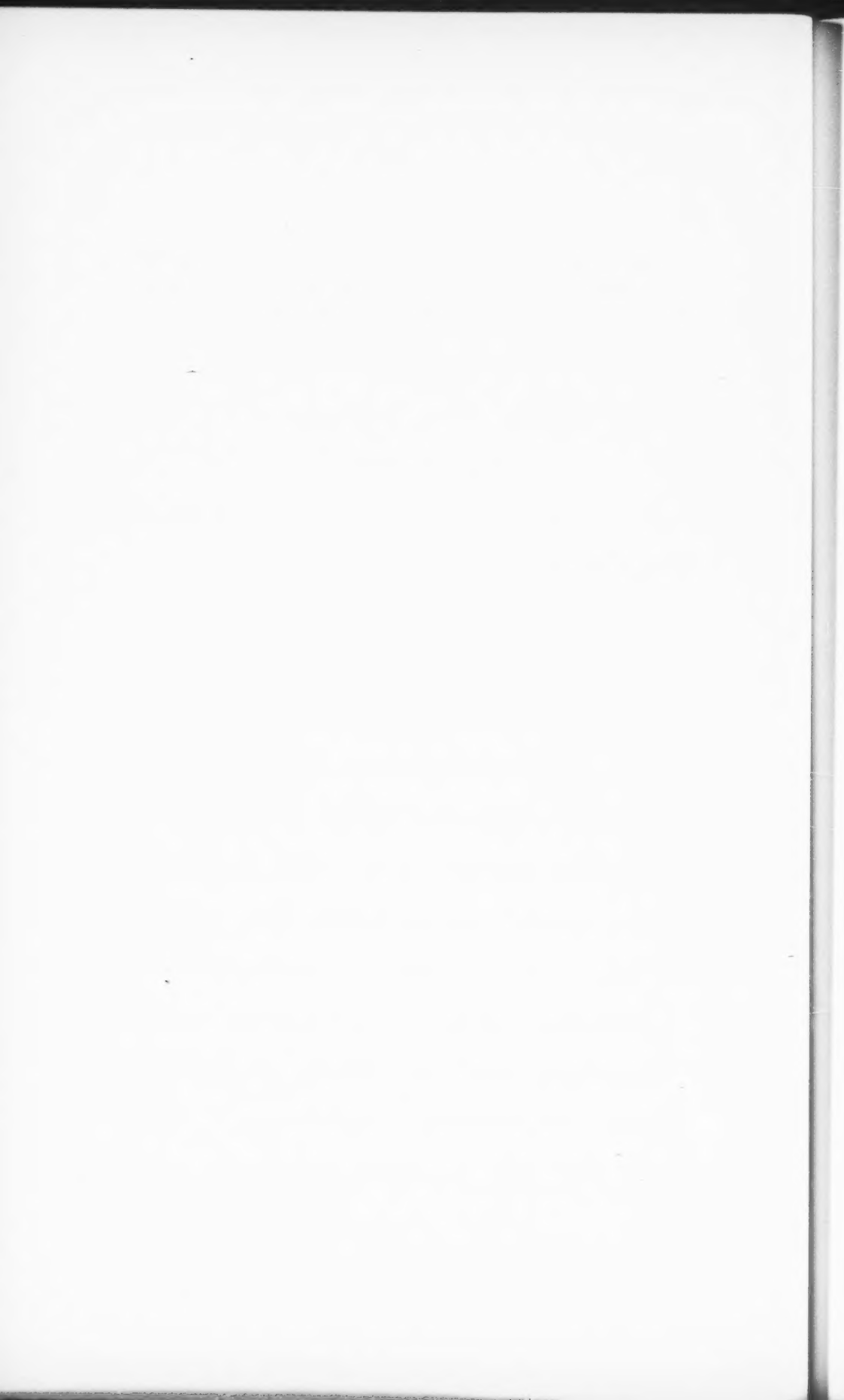
Defendants

OPINION AND ORDER

(Filed February 26, 1982)

This action, which was instituted by David Yashon, M.D. and Thomas Hawk, M.D., seeks declaratory and injunctive relief to compel defendants to reinstate both plaintiffs to the attending medical staff at The Ohio State University Hospitals. On the same day the verified complaint in this





action was filed, plaintiffs filed a motion for a temporary restraining order to require the defendants to reinstate both plaintiffs immediately to the attending medical staff. On July 17, 1981, a consent order was filed, pursuant to which the Court

ordered that, in order to preserve the status quo until the Court renders a decision upon the plaintiffs' request for a preliminary injunction, or until said request is otherwise resolved, Dr. David Yashon and Dr. Thomas Hawk are granted the same rights and privileges which they each had at The Ohio State University Hospitals as of June 30, 1981.

On September 1, 1981, the Medical Staff Administrative Committee of University Hospitals conducted a hearing with respect to Dr. Yashon's application for reappointment to the attending medical staff; at the



conclusion of the hearing, the committee voted to reject Dr. Yashon's application for reappointment. The defendants, contending that the September 1, 1981 hearing afforded Dr. Yashon all the due process to which he was entitled, have now filed a motion to vacate the consent order and for summary judgment.

This matter is now before the Court on the defendants' motion to vacate the consent order insofar as it ordered that Dr. Yashon be granted the same rights and privileges which he held as a member of the attending medical staff at University Hospitals as of June 30, 1981. Also before the Court is defendants' motion for summary judgment with respect to the claims of Dr. Yashon.



A.

The legal questions that require the Court's immediate attention can only be understood by presenting the background to the present controversy between the plaintiff, Dr. David Yashon, and the defendants. Apart from this action, there are two other civil actions now pending before the Court in which Dr. Yashon alleges that his two immediate superiors at The Ohio State University have repeatedly violated his constitutional rights. Accordingly, as a prelude to a discussion and resolution of the immediate issue of whether the defendants have unconstitutionally failed to reappoint Dr. Yashon to the attending medical staff at The Ohio State University Hospitals, the Court will review the

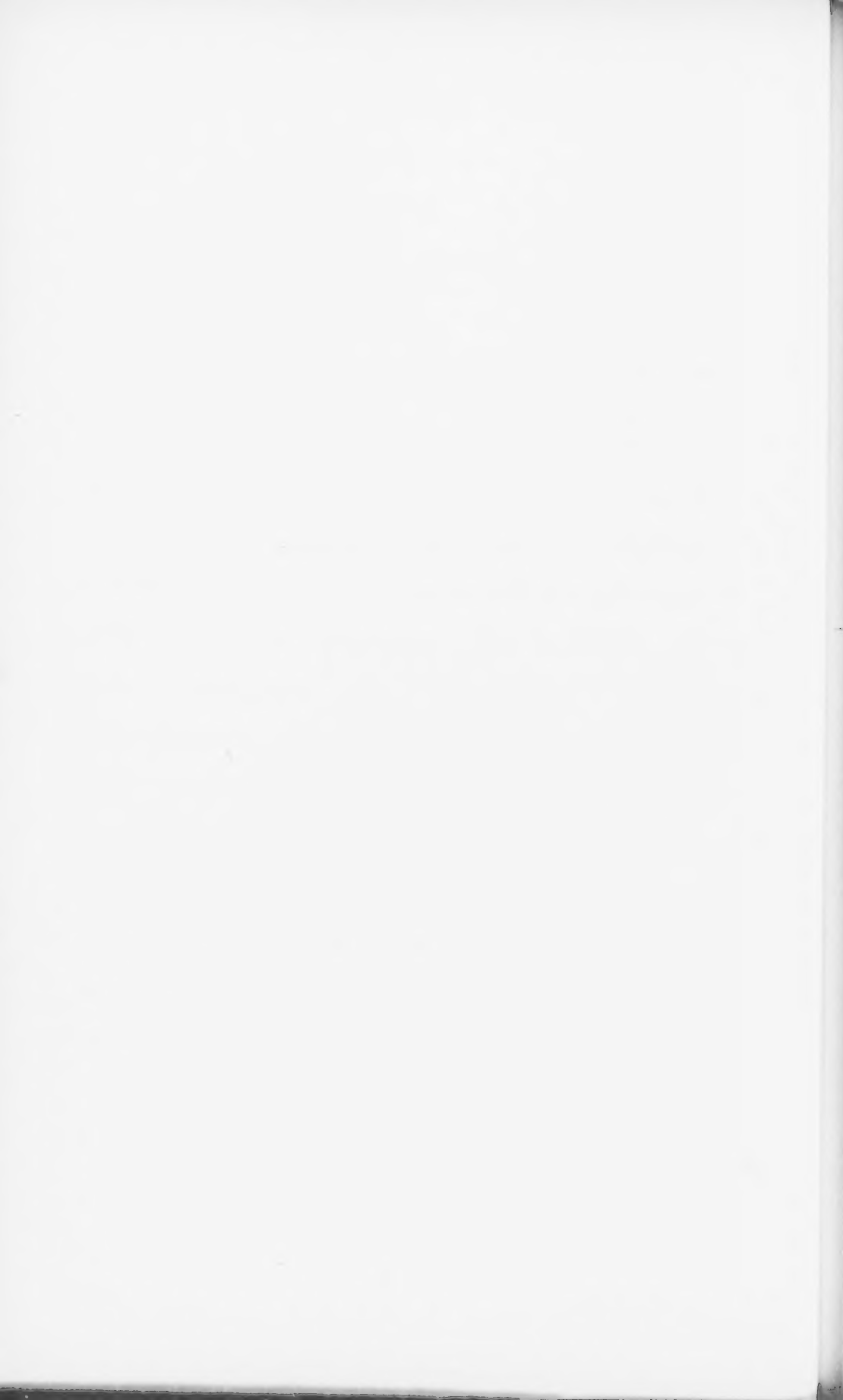


allegations and claims for relief posited by Dr. Yashon in the three actions now pending before the Court.

1. Yashon I

On January 31, 1978, Dr. Yashon filed a civil rights action; David Yashon v. William E. Hunt, C-2-78-66 [hereinafter Yashon I]. The defendant, Dr. Hunt, was employed by The Ohio State University as professor and Director of the Division of Neurologic Surgery within the Department of Surgery, and as Director of the Training Program in Neurologic Surgery and as Chief of the Neurological Surgery Service at The Ohio State University Hospitals [hereinafter University Hospitals].





Dr. Yashon alleged in the complaint that he had entered into a contract with The Ohio State University, effective July 1, 1974, pursuant to which he was appointed as a Professor in the Department of Surgery.<sup>1</sup> (Footnotes appear at the end of the text.) Dr. Yashon further alleged that he was a member of the attending medical staff at University Hospitals and that his membership was governed by the constitution, bylaws, rules and regulations of the medical staff of University Hospitals. (Complaint, ¶¶4, 8.)

With reference to the defendant, Dr. Yashon alleged that he had "been subjected by Defendant to a deliberate and continuing program of harassment, interference and non-cooperation in his performance of the said Contracts and



Attending Staff Membership . . . ."

Complaint, ¶12. This harassment, allegedly undertaken by the defendant through his positions with the university, included, inter alia, the following forms: the defendant interfered with the performance by Dr. Yashon of his duties toward his patients; the defendant interfered with Dr. Yashon's efforts to conduct research; the defendant interfered with Dr. Yashon's teaching responsibilities by giving him a twenty-five percent teaching load in 1976 and no teaching assignments in 1977; the defendant has interfered with Dr. Yashon's publication of research articles; the defendant assigned Dr. Yashon unnecessary research projects and studies; the defendant blackballed Dr. Yashon's nomination for membership in a



national society of neurological surgeons; the defendant verbally berated Dr. Yashon by means of inaccurate accusations of misfeasance or malfeasance in the presence of third parties; the defendant assaulted Dr. Yashon; and the defendant has made numerous inaccurate oral and written criticisms of Dr. Yashon's performance under his contracts with the university to Dr. Yashon himself, as well as to Dr. Yashon's colleagues and superiors. (Complaint, ¶13(a) - (d), (g) - (j).)

Based on these allegations, Dr. Yashon stated six claims for relief that, he prayed, justified an award of \$800,000 in compensatory damages and \$500,000 in punitive damages.<sup>2</sup> These claims were:



FIRST: That defendant's tortious harassment of Dr. Yashon has rendered it more difficult for Dr. Yashon to perform under his contracts with the university, and that defendant intends by such harassment to prevent Dr. Yashon entirely from performing his duties under said contracts;

SECOND: That, since July, 1975, defendant has tortiously engaged in a pattern of extreme and outrageous conduct;

THIRD: That the defendant, through his on-going acts of harassment, has jeopardized Dr. Yashon's professional and





career prospects, impaired his liberty to practice his profession, impaired his rights to make, enforce, and perform contracts, including his contracts with the university, and violated his rights to procedural due process;

FOURTH: That the defendant, in an interoffice communication of April 21, 1977, knowingly and maliciously made false and defamatory statements about Dr. Yashon;

FIFTH: That the defendant, at a April 21, 1977 faculty meeting, knowingly and

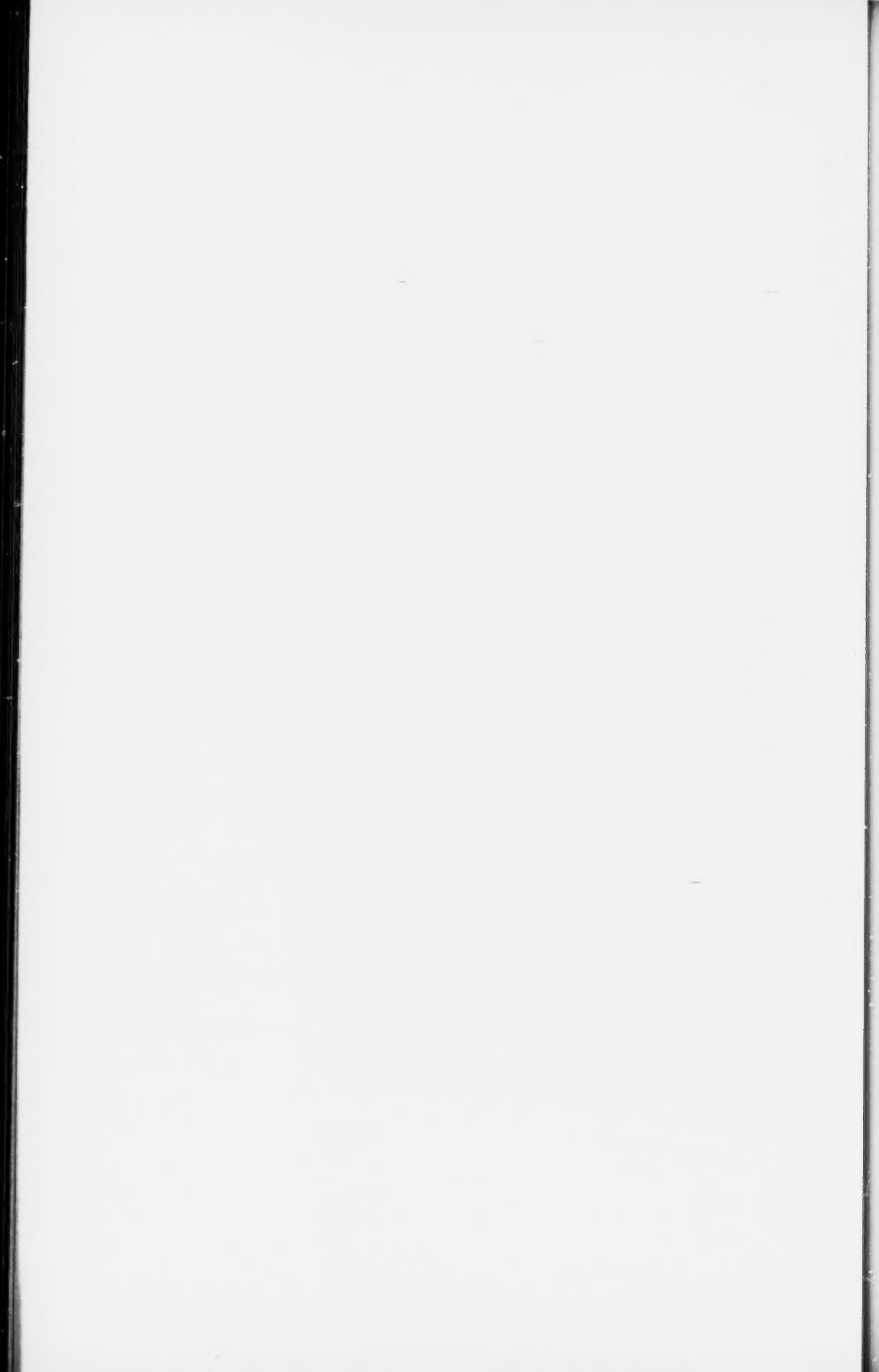


maliciously made false  
statements about Dr. Yashon;  
and

SIXTH: That the defendant, in  
a March 21, 1977 letter to the  
Chairman of the Department of  
Surgery, knowingly and  
maliciously made false  
statements about Dr. Yashon.

The above claims allegedly resulted in  
injury to Dr. Yashon's professional  
reputation, in lost professional fees,  
and in mental distress, anguish,  
embarrassment, and humiliation.

The defendant, Dr. Hunt, filed an  
answer on April 3, 1978 in which he  
denied all of the substantive  
allegations of wrongdoing.



Approximately one year later, on February 9, 1979, Dr. Yashon filed a motion for a preliminary injunction in which he asked that the Court compel Dr. Hunt (1) to reinstate him as a teacher of residents in the Division of Neurologic Surgery in the same manner and to the same degree as other tenured professors in the division and (2) to restore to Dr. Yashon the assistance of residents for all purposes of teaching and patient care in the same manner and to the same degree as other tenured professors in the division. The basis for Dr. Yashon's motion was Dr. Hunt's allegedly unconstitutional conduct in unilaterally notifying Dr. Yashon, in a letter dated December 21, 1978, of his decision to eliminate Dr. Yashon's teaching responsibilities and the



assistance provided Dr. Yashon by residents.

The Court noticed the parties that an evidentiary hearing on Dr. Yashon's motion would be held on February 27, 1979. In lieu of the hearing, the following order was entered on February 27:

By agreement of the parties, and with the approval of the Court, it is hereby ORDERED that the assignment of this cause for an evidentiary hearing on plaintiff's motion for a preliminary injunction on February 27, 1979, is vacated pending the further order of the Court; that the parties will pursue alternative means of resolving the matters raised by said motion and will report back to the Court whether such means have been successful or unsuccessful; that, until further order of the Court or pursuant to the Stipulation of the parties entered into this date, the operation and effect of defendant William E. Hunt's letter of December 21, 1978, to plaintiff David Yashon





shall be stayed and plaintiff restored to the resident teaching program in neurological surgery; and that the pursuit of such means of resolution shall not be considered a waiver by either party of any claims, defenses, rights or privileges which he may have, except as and to the extent the parties may further agree in writing.

The stipulation referred to in the above order had provided:

1. The defendant will take immediate steps to attempt to arrange for a hearing through the Residency Review Committee for Neurological Surgery.

2. If arrangements for such a hearing cannot be made through said Residency Review Committee, or if the parties cannot agree to the hearing procedure, then in that event the parties will attempt to arrange an alternate hearing pursuant to agreement.

3. The subject matter of such hearing before the Residency Review Committee for Neurological Surgery, or such other hearing procedure to which the parties may

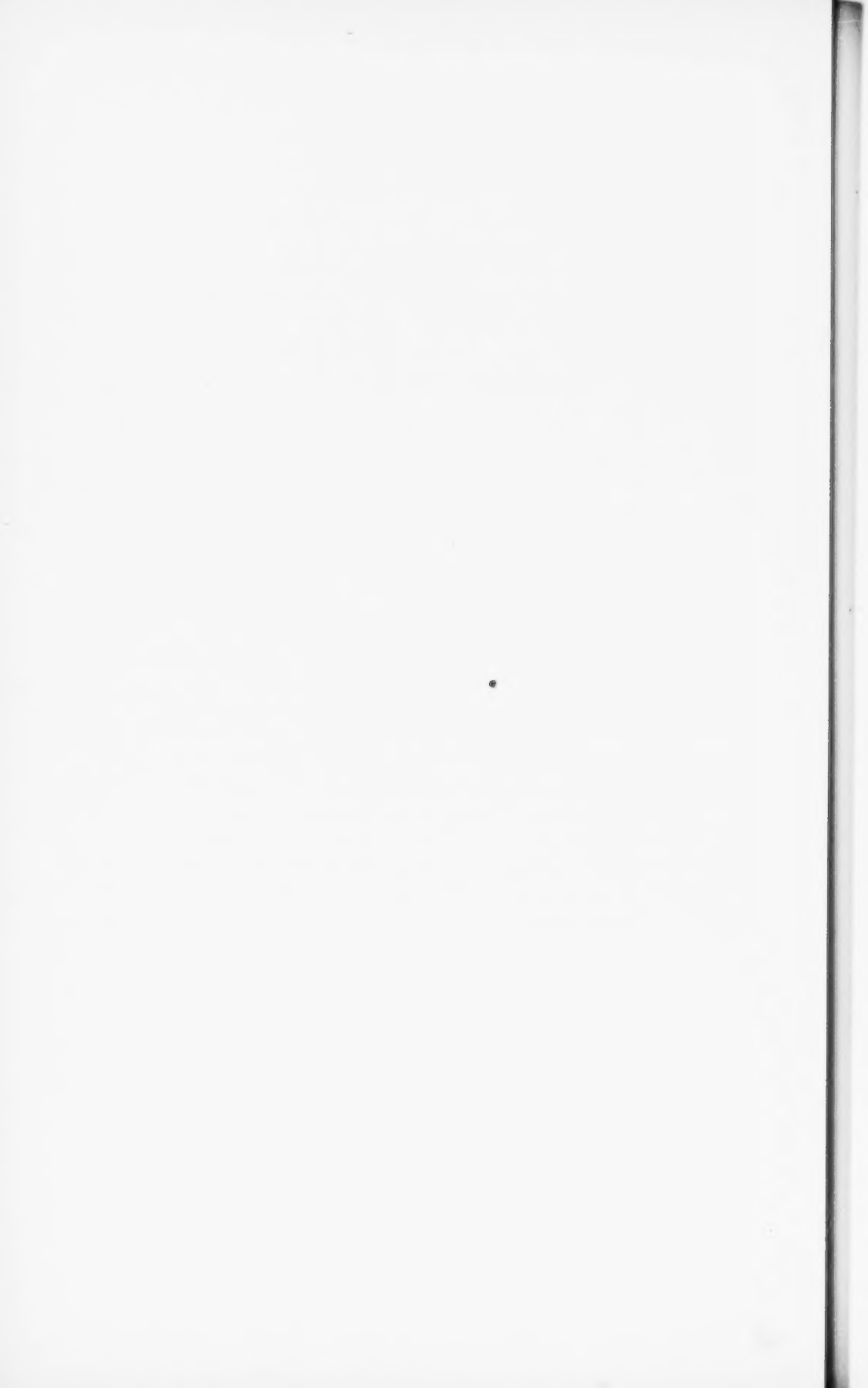


agree, will be whether the action of the defendant of withdrawing the plaintiff from participation in the residency training program was or is justified by the facts relevant thereto. The review of this issue will be on a de novo basis.

4. The procedural and other matters in respect to such hearing will be pursuant to the agreement of the parties.

5. Effective immediately the directive of the defendant, as set forth in his letter of December 21, 1978 to the plaintiff terminating the assignment of the plaintiff to the residency program in neurological surgery will be stayed and held in abeyance pending the holding of a hearing as set forth above, and the determination or decision pursuant to such hearing.

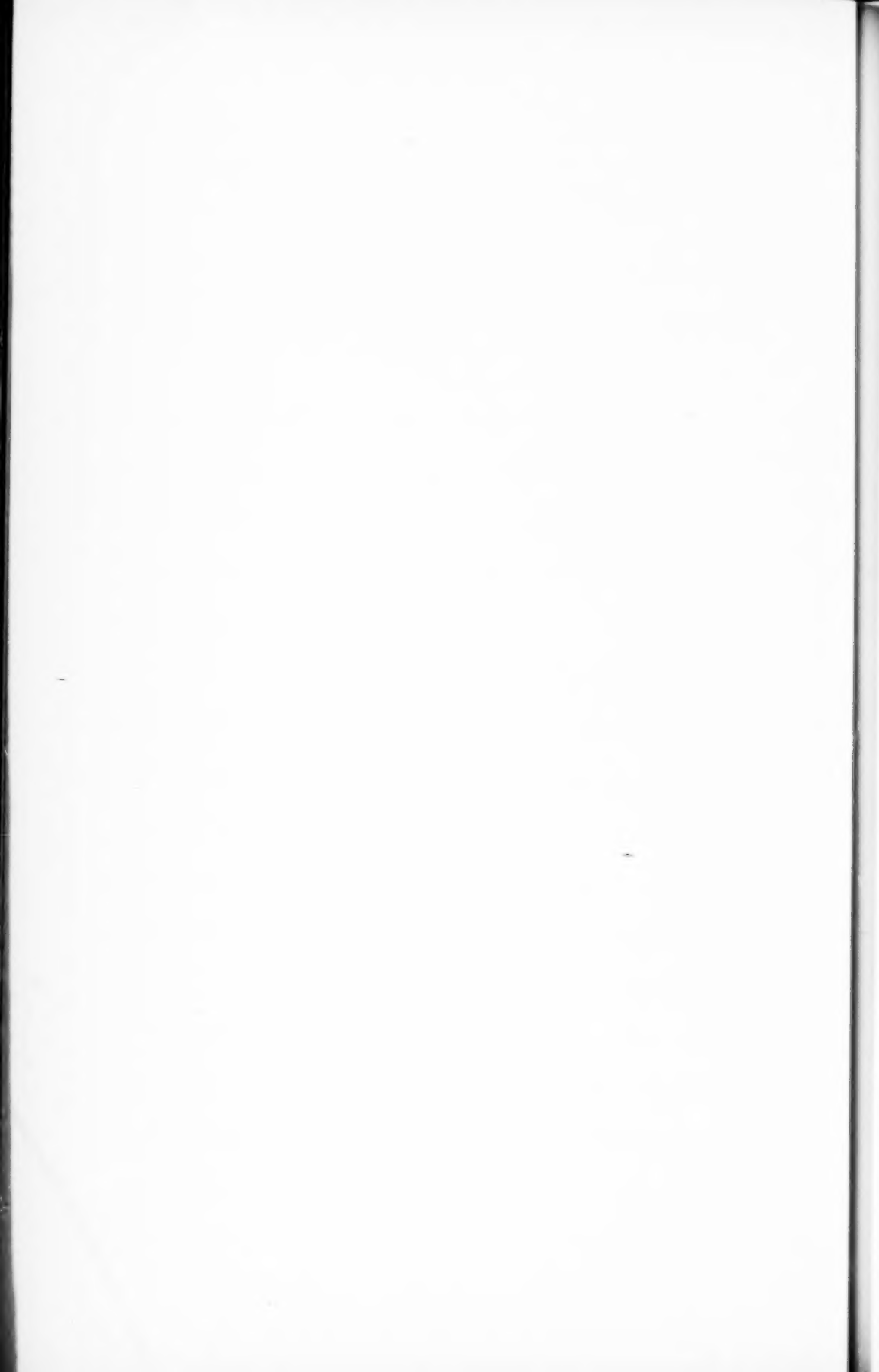
6. In the event that a hearing cannot be arranged through said Residency Review Committee, and the parties cannot otherwise agree with respect to arranging a hearing as provided in paragraphs 1 and 2 above, then the plaintiff will request this Court to assign



the plaintiff's Motion for Preliminary Injunction for an evidentiary hearing.

Appended as Exhibit B to Dr. Yashon's Second Motion for Preliminary Injunction.

On May 7, 1979, Dr. Yashon filed a second motion for a preliminary injunction asking the Court to enjoin a hearing scheduled by Dr. Hunt for May 14, 1979 and to continue in effect the Court's order of February 27, 1979. Dr. Yashon maintained that the planned hearing did not comply with the February 27 stipulation in that the parties had not agreed upon the panel membership or the procedures to be used by the panel and in that the hearing was not to be held before a residency review committee. Dr. Yashon further contended that the proposed date did



not provide him ample time for discovery, that the proposed hearing procedures did not comport with the minimum standards of due process, and that, were the hearing held as scheduled, there was a substantial danger that he would again be wrongly denied of his rights and privileges as a tenured professor.

On May 21, 1979, the Court entered another order in this case:

By agreement of the parties, and with the approval of the Court, it is hereby ORDERED that this cause will not be assigned for a hearing on plaintiff's motion for preliminary injunction until further order of the Court; that the Court's order of February 27, 1979, is vacated insofar as it stayed the operation and effect of defendant William E. Hunt's letter of December 21, 1978 and restored plaintiff David Yashon to the Resident Training Program in Neurologic Surgery; that, until further order of the





Court or pursuant to the parties' Agreement of May 10, 1979, plaintiff will not be a member of the faculty of the Resident Training Program in Neurologic Surgery; and that the agreement reflected herein, the Agreement of May 10, 1979, and the parties' pursuit of further alternative means of resolution of the issues raised by plaintiff's motion for preliminary injunction shall not be considered a waiver by either party of any claims, defenses, rights or privileges which he may have, except as and to the extent the parties may later agree in writing.

The agreement referred to in the order<sup>3</sup> provided:

In order to facilitate Dr. David Yashon in his efforts to seek relocation outside The Ohio State University, the following arrangements are agreed to by David Yashon, William E. Hunt, and their respective counsel:

1. Dr. Yashon agrees that the decision of Dr. Hunt on December 21, 1978, to remove Dr. Yashon from the faculty of the Residency Training



Program of Neurologic Surgery shall be reinstituted to take effect May 14, 1979, and remain in effect until such time as Dr. Yashon is reinstated to the faculty of the Residency Training Program by a decision of a hearing panel, further order of the Court or the further agreement of the parties.

2. The hearing set for May 14, 1979, to review Dr. Hunt's decision of December 21, 1978 is cancelled. The parties will jointly notify Attorney William Alexander of this cancellation.

3. Beginning immediately and continuing through September 4, 1979, plaintiff will actively seek to locate and obtain a position comparable to that which he now holds in an institution outside of The Ohio State University which is acceptable to him. Defendant agrees to support this endeavor by not interfering with and not taking any action which would adversely impact upon this endeavor. Further, it is understood that this endeavor cannot be successful without the active assistance, cooperation and support of the administration of The Ohio State University



Hospitals and The Ohio State  
University College of  
Medicine.

4. Dr. Yashon may not request restoration to the faculty of the Residency Training Program in Neurologic Surgery until after September 4, 1979. After September 4, 1979, if Dr. Yashon has not relocated outside The Ohio State University and remains a staff member of University Hospital and a faculty member of The Ohio State University, he may thereafter request a hearing to determine whether he should be restored to the faculty of the Residency Training Program. If such a request for a hearing is made by Dr. Yashon, it is contemplated that the hearing will be held before at least three (3) members of the Residency Review Committee for Neurologic Surgery. The Committee itself shall select the three (3) of its own members who will comprise the hearing panel. Dr. Yashon shall not be a member of the faculty of the Residency Training Program in Neurologic Surgery unless and until restored to such position by decision of the foregoing panel, order of the Court or further agreement of



the parties. The procedure for such hearing shall be established by agreement of the parties. The subject matter of the hearing before such panel will be whether the action of defendant in withdrawing the plaintiff from participation in the Residency Training Program was or is justified by the facts relevant thereto, such determination to be made on a de novo basis.

5. It is further agreed that beginning May 14, 1979, provisions will be made for plaintiff's continuation and performance of his responsibilities and duties as a professor and attending physician pursuant to Dr. Hunt's amended memorandum of January 18, 1979. A copy of that amended memorandum is attached hereto as Exhibit "A".<sup>4</sup>

There is no indication in the record of any of the Yashon cases that Dr. Yashon has, to date, requested his restoration to the faculty of the Residency Training Program in Neurologic Surgery





pursuant to paragraph 4 of the May 10, 1979 agreement.

Apart from the matters raised by the two motions for preliminary injunctive relief, the underlying complaint, with the claims against Dr. Hunt for compensatory and punitive damages, is still pending before the Court.

## 2. Yashon II

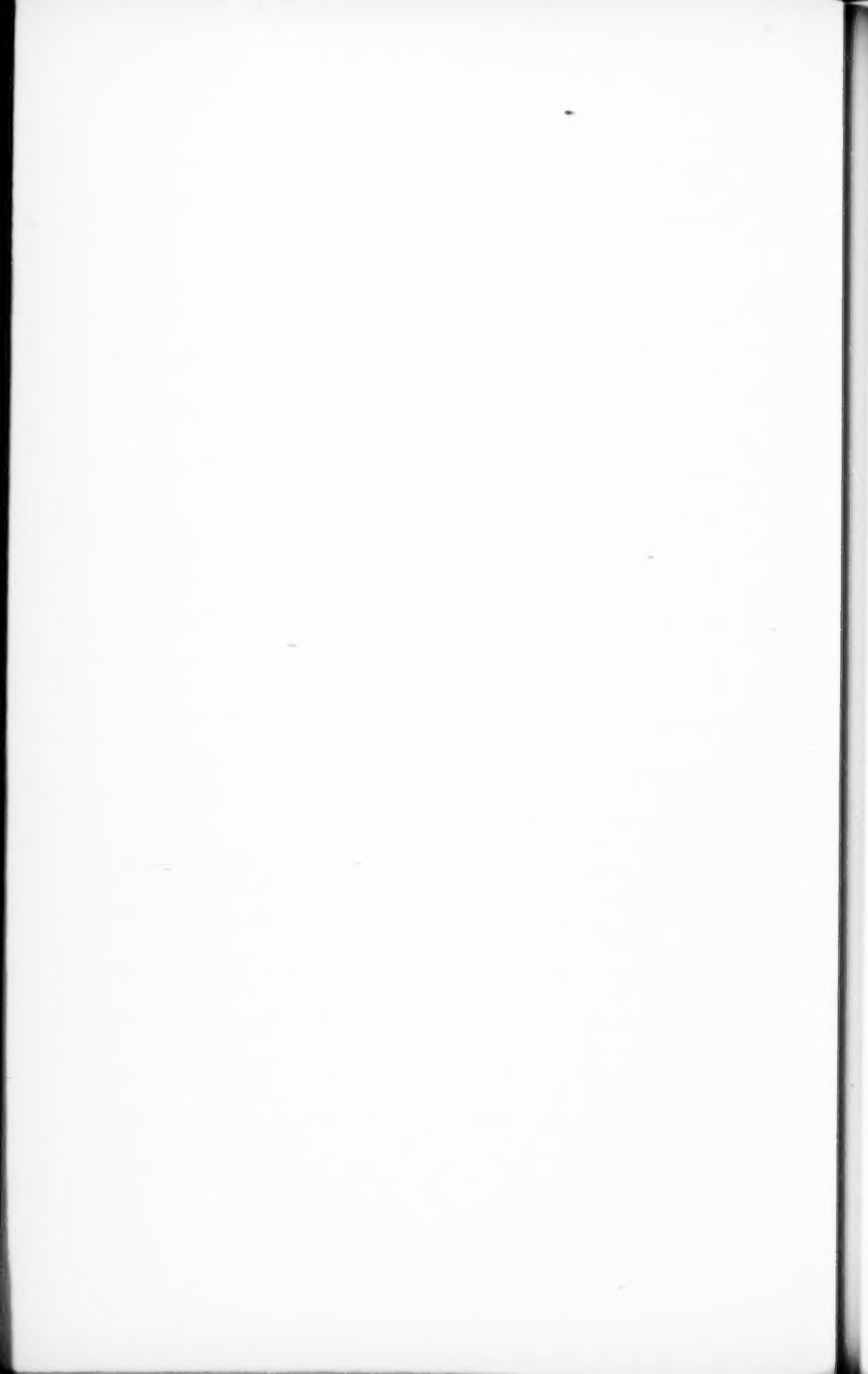
On March 4, 1981, Dr. Yashon filed a second civil rights action, David Yashon v. Larry C. Carey, C-2-81-411 [hereinafter Yashon II]. The defendant, Dr. Carey, was employed by The Ohio State University as professor and chairman of the Department of Surgery, and as the Director of the Training Program in General Surgery and



Chief of the Clinical Division of Surgery in University Hospitals.

The initial allegations in the Yashon II complaint clearly paralleled those in Yashon I. That is Dr. Yashon alleged that he was a tenured faculty member, alleged the terms of his contract with the university, and alleged that his membership on the attending medical staff at University Hospitals was governed by the constitution, bylaws, rules and regulations of the medical staff. (Complaint, ¶¶4, 6 - 8.)

Again, consistent with the allegations in Yashon I, Dr. Yashon alleged that he had "been subjected by defendant [Carey] to a deliberate and continuing program of harassment, interference and non-cooperation in his performance of the said contracts and



attending staff membership . . . ."

Complaint, ¶12. This harassment, allegedly undertaken by the defendant through his positions with the university, included, inter alia, the following forms: the defendant participated in, condoned, and failed to prevent an ongoing program of harassment, interference and non-cooperation by Dr. William H. Hunt, the Director of the Division of Neurologic Surgery in the Department of Surgery and the Chief of the Clinical Division of Neurologic Surgery; on May 5, 1978, the defendant, without adequate investigation, submitted a groundless charge of grave misconduct against Dr. Yashon in connection with the inclusion of the name of another faculty member as a research consultant on an application for a research grant;

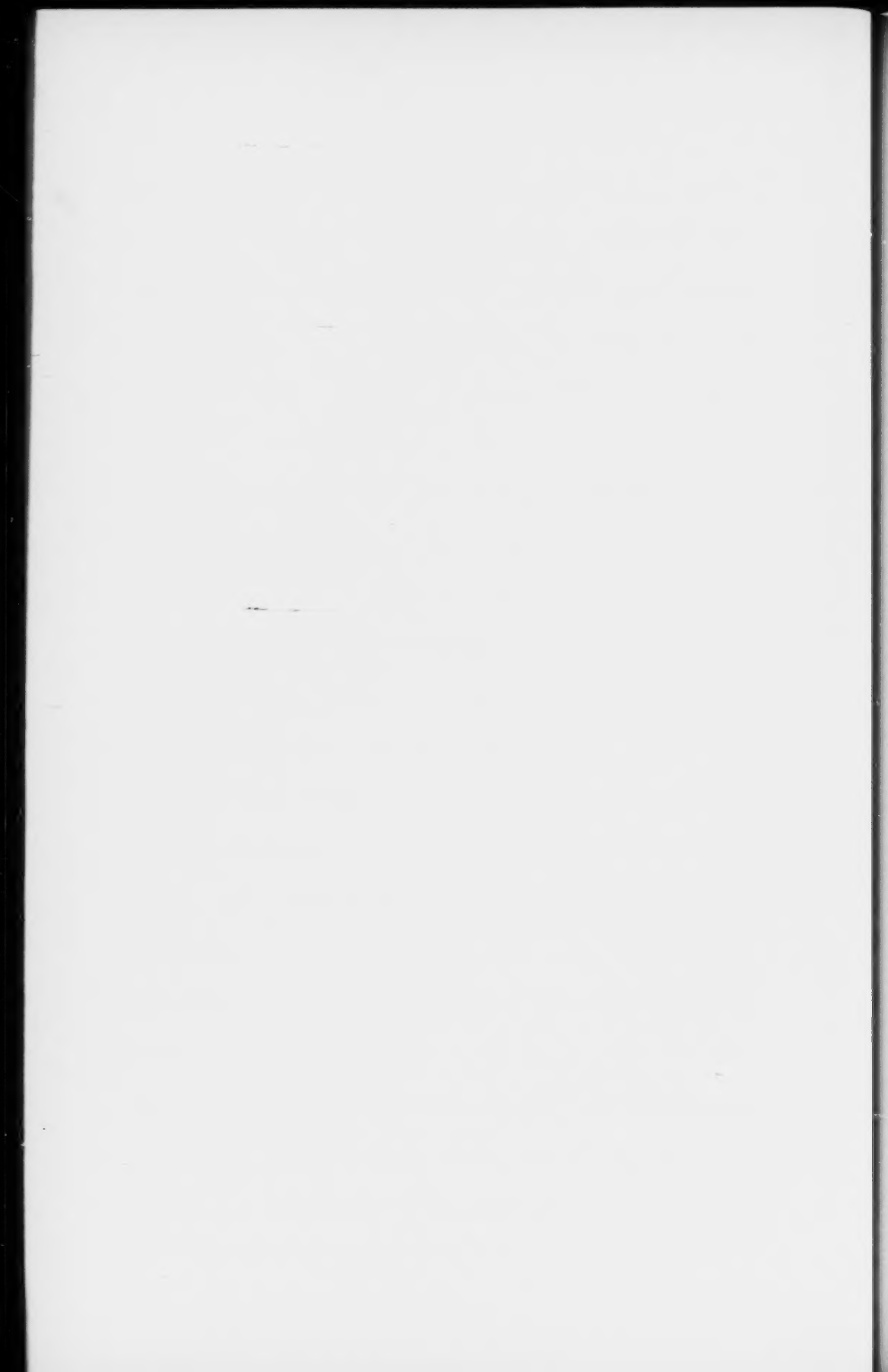


in December, 1978, the defendant summarily excluded Dr. Yashon from the list of those to whom general surgery residents would be assigned for training and participated in the summary removal of Dr. Yashon from the residency training program in neurologic surgery; on October 27, 1979, the defendant instituted procedures to force the removal of Dr. Yashon from the attending medical staff of University Hospitals despite the fact that the charges made by defendant were recklessly proffered with little or no investigation and with the purpose of destroying Dr. Yashon's career as an academic surgeon; the defendant denied Dr. Yashon access to medical records, access to which was necessary to defend against the charges filed on October 27, 1979; on May 31,





1980, the defendant, without authority and without an adequate factual basis, summarily and indefinitely suspended Dr. Yashon's admission and operating room privileges at University Hospitals; the defendant has established, approved and/or acquiesced in hospital practices and policies that discriminate against Dr. Yashon; the defendant has precluded Dr. Yashon from performing valuable and necessary research; the defendant has verbally berated Dr. Yashon through inaccurate accusations of misfeasance, malfeasance, or nonfeasance in the presence of third persons; and the defendant has made numerous inaccurate oral and written criticisms of Dr. Yashon's performance under his contracts with the university to Dr. Yashon's colleagues, superiors, and



various committees of University Hospitals. (Complaint, ¶13(a) - (e), (g), (i) - (l).)

Based on these allegations, Dr. Yashon stated five claims for relief that, he prayed, justified an award of \$5,000,000 in compensatory damages and \$5,000,000 in punitive damages.<sup>5</sup> These claims were:

FIRST: That defendant's tortious harassment of Dr. Yashon has rendered it more difficult and, in some cases, impossible for Dr. Yashon to perform under his contracts with the university, and that defendant intends by such harassment to prevent Dr. Yashon entirely from



performing his duties under  
said contracts;

SECOND: That, since January,  
1976, defendant has  
tortiously engaged in a  
pattern of extreme and  
outrageous conduct;

THIRD: That the defendant,  
through his on-going acts of  
harassment, has jeopardized  
Dr. Yashon's professional and  
career prospects, impaired  
his liberty to practice his  
profession, impaired his  
right to make, enforce, and  
perform contracts, including  
his contracts with the  
university, and violated his



rights to procedural due process;

FOURTH: That the defendant, during a meeting of the executive committee of the medical staff of University Hospitals, knowingly and maliciously made false and defamatory statements about Dr. Yashon; and

FIFTH: That the defendant did willfully and maliciously make defamatory statements about Dr. Yashon to members of other hospitals in the Columbus, Ohio area and that the defendant did communicate unflattering statements about Dr. Yashon to department



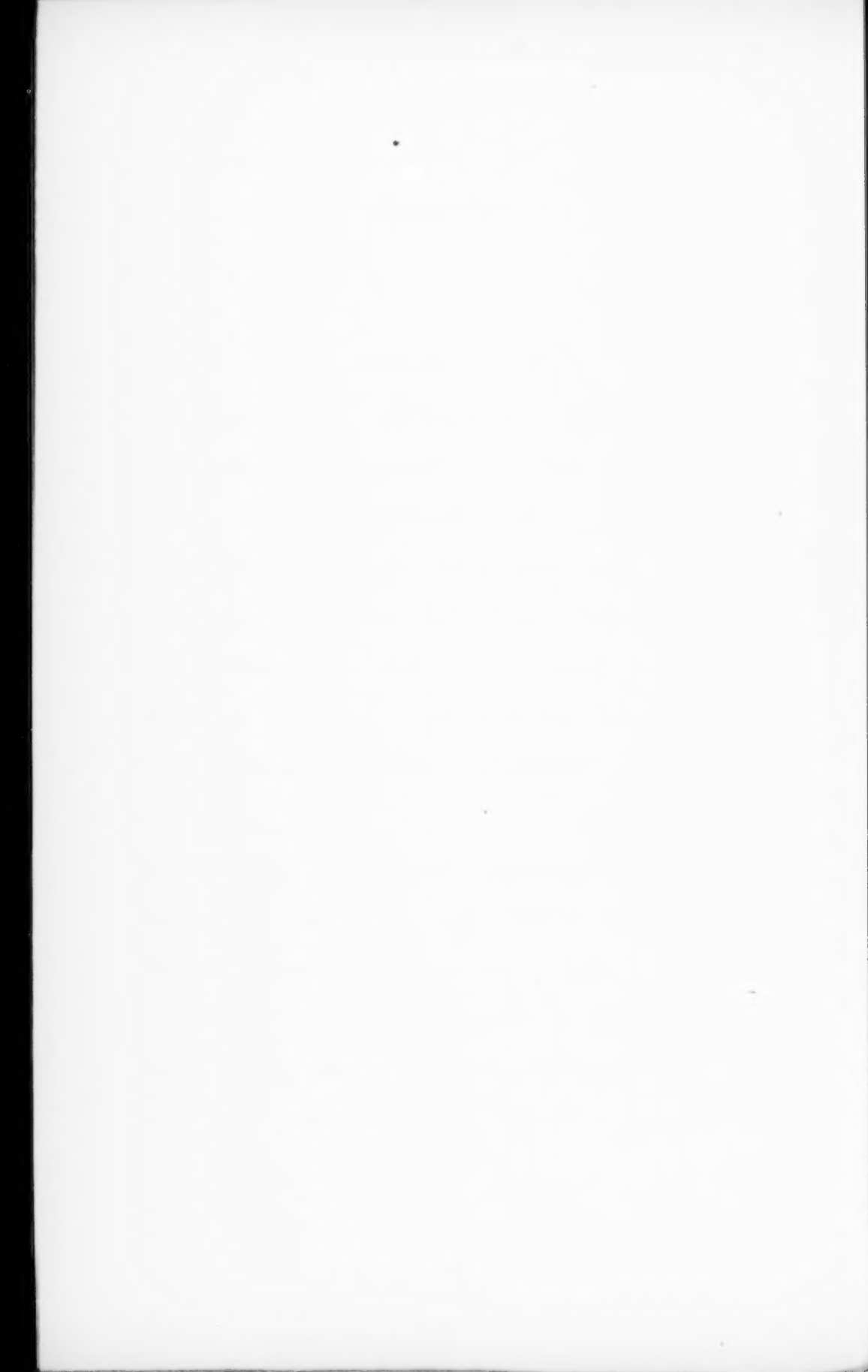


chairmen at other medical  
schools throughout the  
country.

As was the case in Yashon I, the above  
claims also allegedly resulted in  
injury to Dr. Yashon's professional  
reputation, in impairment of his  
ability to function as an academic  
neurosurgeon and to provide quality  
medical care for his patients at  
University Hospitals, and in mental  
distress, anguish, embarrassment, and  
humiliation.

The defendant, Dr. Carey, filed an  
answer on March 30, 1981 in which he  
denied all of the substantive  
allegations of wrongdoing.

Subsequently, on June 29, 1981, the  
plaintiff filed a motion for a



preliminary injunction. The basis for this motion was Dr. Carey's allegedly unconstitutional failure to recommend Dr. Yashon's reappointment to the attending medical staff of University Hospitals for the period beginning July 1, 1981.<sup>6</sup> Dr. Carey filed a motion to dismiss the motion for a preliminary injunction on July 2, 1981 in which he argued (1) that the motion for a preliminary injunction was improper because Dr. Carey was not empowered to grant the relief requested, that is, Dr. Yashon's reinstatement to the attending medical staff and (2) that the motion was premature in that Dr. Yashon had failed to pursue his administrative remedies.<sup>7</sup>

To date, no further action has been taken in this case.



### 3. Yashon III

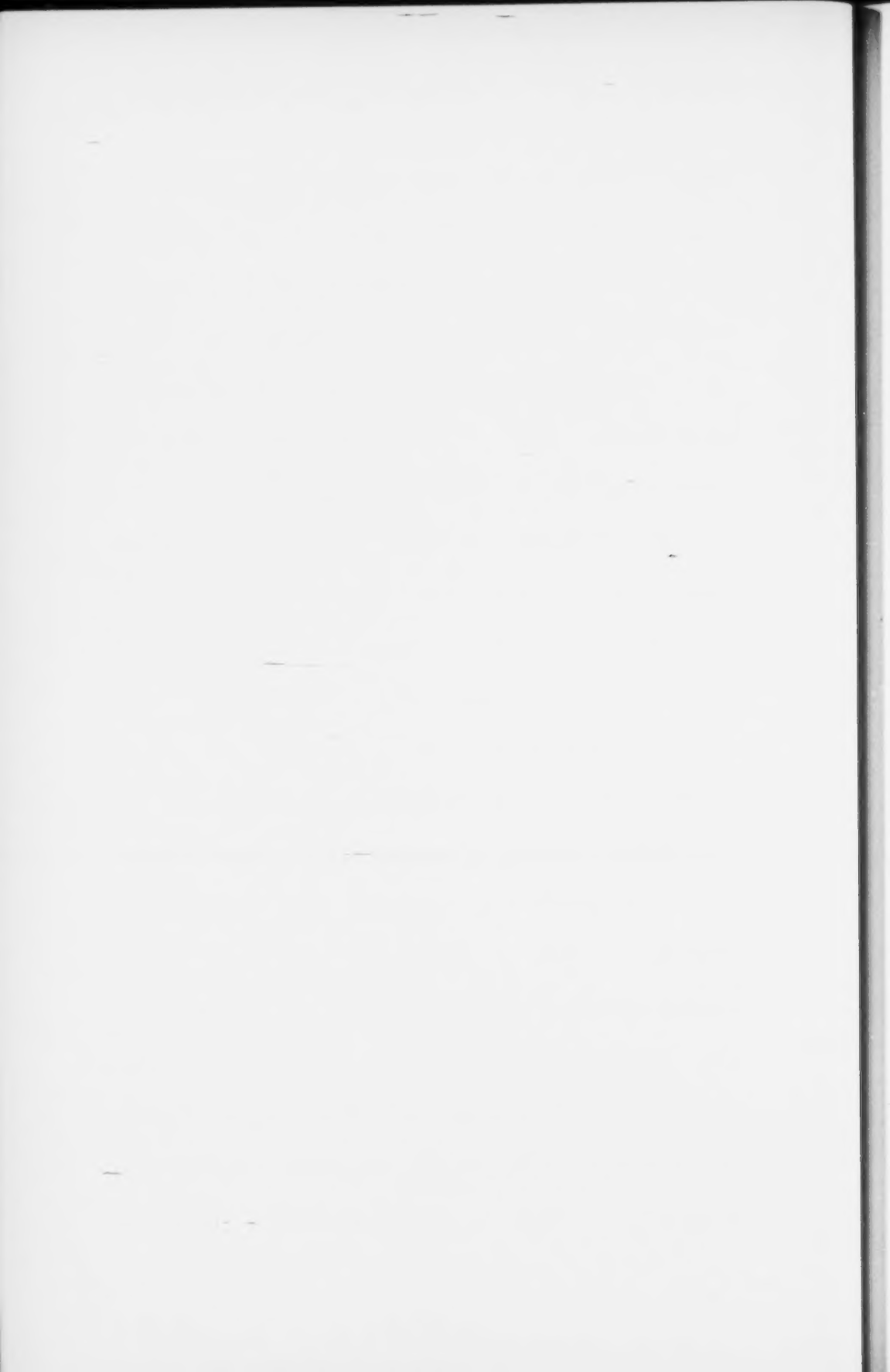
On July 16, 1981, Dr. Yashon and Thomas Hawk, M.D. filed a civil rights action; David Yashon, M.D., et al v. William E. Hunt, M.D., et al, C-2-81-867 [hereinafter Yashon III]. Named as defendants in the verified complaint are Dr. Hunt, Dr. Carey, the individual members of the Board of Trustees of The Ohio State University,<sup>8</sup> the individual members of the University Hospitals Board,<sup>9</sup> the individual members of a Joint Conference Committee,<sup>10</sup> and the individual members of the Medical Staff Administrative Committee.<sup>11</sup> According to plaintiffs, this action was "instituted to redress and enjoin the ongoing and threatened actions of



defendants Hunt and Carey to deprive plaintiffs of equal protection of the laws and of their property and liberty interests without due process of law, in violation of the Fourteenth Amendment to the United States Constitution." Complaint, ¶13.<sup>12</sup>

Dr. Yashon alleges in the verified complaint that he entered into a contract with The Ohio State University, effective September 1, 1969, pursuant to which he was appointed as an Associate Professor in the Department of Surgery. The terms of this contract include the letter of offer, the annual notices of appointment, the relevant statutes of the State of Ohio, the bylaws of the Board of Trustees of The Ohio State University, the rules of the university faculty, the departmental and/or





college statement of criteria and procedures for promotion and tenure, the faculty handbook, the operating manual, the University Hospitals Board bylaws, and any written understandings between Dr. Yashon and the university regarding his employment. Pursuant to this contract, Dr. Yashon was awarded tenure in 1976 and was promoted to the position of full professor in the Division of Neurologic Surgery of the Department of Surgery in 1974. (Complaint, ¶¶16 - 18.)

Dr. Yashon further alleges that, effective September, 1969, he was appointed to the attending medical staff of University Hospitals; this appointment was concurrent with and a result of his appointment to the faculty and was in accord with the constitution, bylaws, rules and



regulations of the medical staff of University Hospitals. Since 1969, Dr. Yashon's appointment to the faculty and to the attending medical staff have been continued through annual notices of reappointment. The continuing appointment to the attending medical staff has been recognized by the university, according to Dr. Yashon, as an absolute requirement in his role as a professor in the Division of Neurologic Surgery. (Complaint, ¶¶19 - 21.)

—Prior to June, 1981, Dr. Yashon submitted his application for reappointment to the attending medical staff.<sup>13</sup> On June 18, 1981, Dr. Manuel Tzagournis informed Dr. Yashon that Dr. Carey had refused to submit his name to the Medical Staff Administrative Committee and that, therefore, as of



July 1, 1981, Dr. Yashon would no longer be a member of the attending medical staff.<sup>14</sup> Dr. Yashon had not been previously notified of Dr. Carey's intention not to recommend his reappointment; in addition, Dr. Yashon had not been told of any outstanding charges against him that would support Dr. Carey's decision nor, if such charges existed, was he afforded any opportunity to respond to such charges. (Complaint, ¶¶29 - 31.)

Dr. Yashon contends that the decision by Dr. Carey not to recommend his reappointment

was [upon information and belief] participated in by defendant Hunt and was a product of the continuous harassment, interferences and deprivations committed by defendants Carey and Hunt in their ongoing effort to force plaintiff Yashon from the University Hospitals and the College of Medicine, in



violation of his contract, tenure and Constitutional rights, as more fully described and set forth in Yashon v. Carey, Civil Action No. C-2-81-411, and Yashon v. Hunt, Civil Action No. C-2-78-066 on the dockets of this Court.

Complaint, ¶32. This latest action by Dr. Carey and Dr. Hunt followed two previously unsuccessful attempts by Dr. Carey to remove Dr. Yashon from or to curtail his privileges as a member of the attending medical staff (Complaint, ¶¶33 - 38).<sup>15</sup>

In sum, Dr. Yashon alleges that

[t]he present attempt by Drs. Carey and Hunt to block plaintiff's reappointment to the Medical Staff is in flagrant and malicious disregard of the decisions of the duly constituted committees of the University Hospitals rejecting their prior attempts to remove and/or curtail plaintiff Yashon's clinical privileges, the formal procedures established by the





Constitution and Bylaws of the Medical Staff for such removal or curtailment, plaintiff's status as a full, tenured Professor, the Rules of the University Faculty specifying the procedures by which plaintiff's contract and tenure may be terminated for cause, plaintiff's established right to reappointment, and plaintiff's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

Complaint, ¶39.

Based on these allegations, Dr. Yashon puts forth four claims for relief. Under his first, second, and third claims, he states alternate theories to support his contention that the attempted termination of his membership on the attending medical staff violated numerous of his constitutional rights and specifically deprived him of his property and



liberty - without due process of law.

Dr. Yashon contends:

1. That, pursuant to the rules of the university faculty, the bylaws of the University Hospitals Board, and the constitution and bylaws of the medical staff of University Hospitals, he was entitled to have his appointment to the attending medical staff continued through annual reappointments, subject to his medical staff privileges being terminated only on the grounds and pursuant to the procedures established for revocation of his tenure and/or the grounds and



procedures established for removal of medical staff privileges under the constitution and bylaws of the medical staff;

2. That, pursuant to the custom and usage of the University Hospitals in routinely and automatically reappointing him and others to the attending medical staff, he had a reasonable expectation that he would continue to be reappointed to the medical staff annually, unless he was removed on grounds and pursuant to procedures established for the termination of his right to engage in clinical



teaching and academic  
medicine; or

3. That, as a tenured  
member of the faculty, he is  
entitled to continued  
reappointment to the  
attending medical staff,  
subject to that membership  
being terminated only  
pursuant to the rules of the  
university faculty governing  
the grounds and procedures  
for termination of tenure.

Complaint, ¶¶46, 48, 50. Finally,  
under his last claim,<sup>16</sup> Dr. Yashon  
states that he is entitled to  
reappointment to the attending medical  
staff because the procedures





"purportedly" followed by defendants in denying his reappointment are constitutionally defective. Complaint, ¶54.17

In his prayer for relief, Dr. Yashon asked that the Court grant preliminary and permanent injunctive relief (1) compelling defendants to reinstate him to membership on the attending medical staff of University Hospitals with all rights and privileges pertaining thereto, including full participation in the residency training program in Neurosurgery; and (2) restraining Drs. Hunt and Carey from further attempting to discharge, dismiss, or terminate Dr. Yashon from the attending medical staff without complying with the requirements and procedures of the rules of the university faculty and the

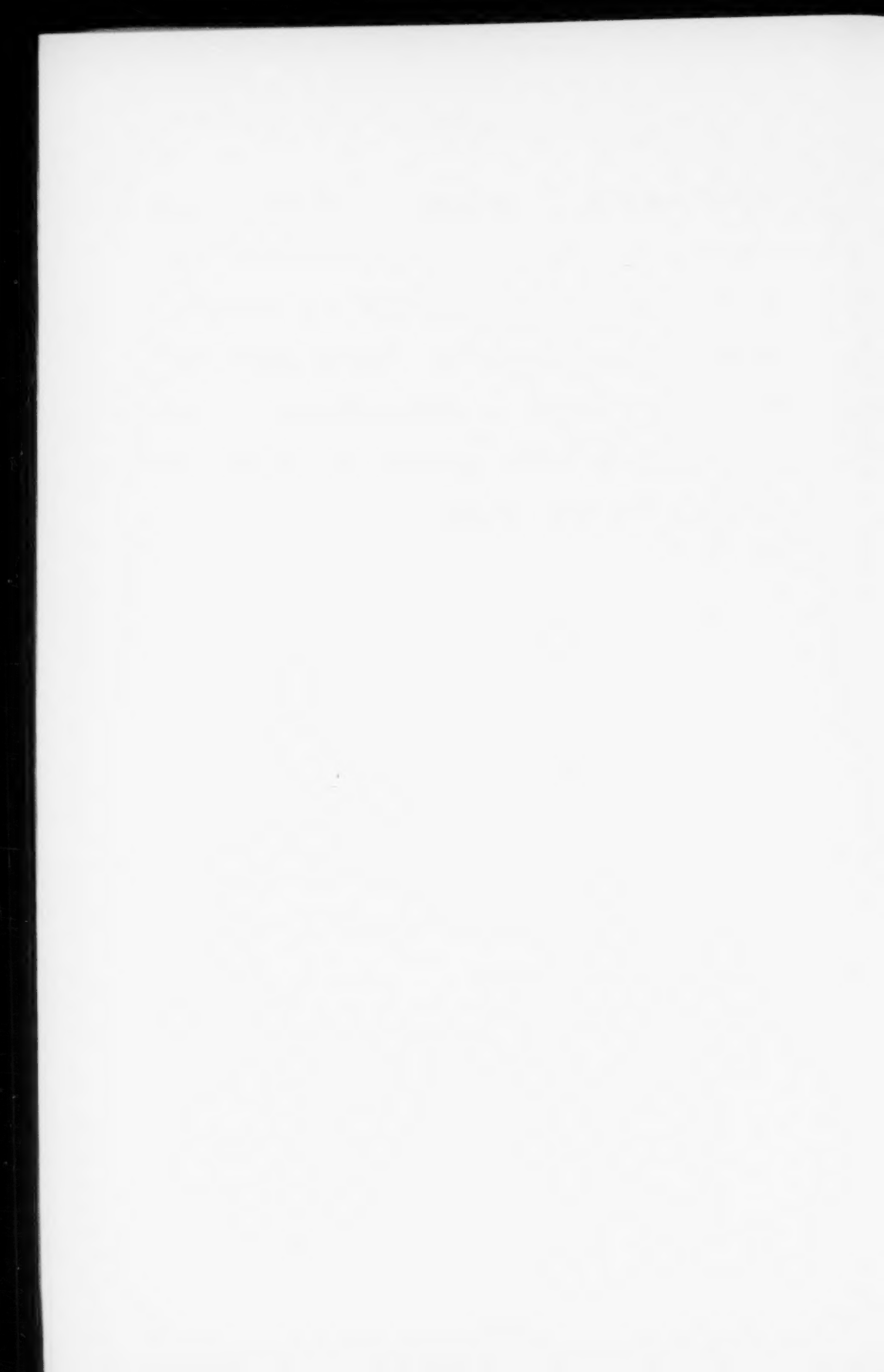


constitution, bylaws, rules and regulations of the medical staff and from further attempting to harass, threaten, coerce, or intimidate Dr. Yashon into terminating his relationship with University Hospitals or with The Ohio State University.

B.

Simultaneous with the filing of the complaint in Yashon III on July 16, 1981, the plaintiffs filed a motion for a temporary restraining order. On July 17, 1981, the Court filed a consent order in Yashon III:

It is hereby agreed and so ordered that, in order to preserve the status quo until the Court renders a decision upon the plaintiffs' request for a preliminary injunction, or until said request is otherwise resolved, Dr. David Yashon and Dr. Thomas Hawk



are granted the same rights and privileges which they each had at The Ohio State University Hospitals as of June 30, 1981.<sup>18</sup>

This consent order had been expressly approved by counsel for both parties.

On July 17, 1981, the Court also conferred in chambers with Rudolph Janata, trial attorney for Dr. Yashon, and John Elam, trial attorney for the defendants. In the course of this conference, the Court stated that Dr. Carey

should forward plaintiff Yashon's application for reappointment to the medical staff . . . to the Medical Staff Administrative Committee of The Ohio State University Hospitals for disposition in the same routine manner as other such applications for reappointment were processed. Judge Kinneary indicated that his directive was prompted by consideration of judicial economy; if the Medical Staff Administrative



Committee acted favorably on plaintiff Yashon's application for reappointment to the medical staff, the present lawsuit would be moot.

Mr. Elam then requested that defendant Carey be allowed to explain to the Medical Staff Administrative Committee his reasons for refusing to recommend the reappointment of plaintiff Yashon to the medical staff. Judge Kinneary agreed to this request, stating that defendant Carey be allowed to explain to the Medical Staff Administrative Committee his reasons for refusing to recommend the reappointment of Yashon to the medical staff and that plaintiff Yashon be afforded an opportunity to respond to defendant Carey's explanation. Judge Kinneary stated that he did not want a "hearing" as such and that no counsel were to be present at the meeting of the Medical Staff Administrative Committee held to consider plaintiff Yashon's application for reappointment to the medical staff.

At no time did Judge Kinneary suggest, indicate or order that the Medical Staff Administrative Committee





conduct a "due process" hearing on plaintiff Yashon's application for reappointment to the medical staff, at whcih hearing witnesses could be called and examined. Instead, Judge Kinneary suggested that plaintiff Yashon and defendant Carey each make a presentation to the Medical Staff Administrative Committee concerning plaintiff Yashon's application for reappointment to the medical staff.

Affidavit of Rudolph Janata at ¶13, appended as Exhibit A to Plaintiff David Yashon, M.D.'s Memorandum in Opposition to Defendants' Motion to Vacate Consent Order and for Summary Judgment [hereinafter Janata Affidavit].

With the consent order in effect, the matter of Dr. Yashon's reappointment to the attending medical staff was now back with the university.



# 1. Notice of the Hearing

In late July, Dr. Michael E. Whitcomb contacted Dr. Yashon and informed him of his plans to arrange a meeting of the Medical Staff Administrative Committee to consider Dr. Carey's refusal to recommend Dr. Yashon's reappointment to the medical staff at University Hospitals. App. A at 360-61.<sup>19</sup> The hearing before the Medical Staff Administrative Committee was scheduled for September 1, 1981 at 7:30 a.m.; Dr. Yashon was given notice of the meeting by letters from Dr. Tzagournis and Dr. Whitcomb. App. B, Attachments I and II.<sup>20</sup> Subsequent to Dr. Yashon's receipt of these letters, both Dr. Tzagournis and Dr. Whitcomb communicated with him by telephone; they both explained to Dr. Yashon that,



apart from the reasons outlined by Dr. Carey in his August 14, 1981 letter to Dr. Tzagournis, see App. B, Attachment III, they had no knowledge of any witnesses who might be called by or of any documents that might be presented by Dr. Carey at the September 1 hearing. App. A at 362-63.<sup>21</sup>

Thus, the only information formally provided Dr. Yashon prior to the hearing was that contained in Dr. Carey's letter to Dr. Tzagournis. This letter, copies of which were not distributed by Dr. Whitcomb to members of the Medical Staff Administrative Committee prior to the September 1 hearing, App. A at 48, 362, explained the basis for Dr. Carey's refusal, as Chairman of the Department of Surgery, to recommend Dr. Yashon's reappointment to the medical staff. As a prelude to



more specific charges justifying his action, Dr. Carey stated:

Because the University Hospital is a teaching institution, its faculties must be limited to those making a positive contribution in that area. The basis for my refusal to recommend Dr. Yashon's reappointment is that his activities and professional conduct over the past five years at The Ohio State University have violated the standards of the medical staff and have been disruptive to the Clinical Division of Neurosurgery and the University Hospitals in general. His actions of harassment, disruption, insubordination, lack of cooperation, and misconduct among fellow members of the medical staff, the administration of University Hospitals, and other non-M.D. staff members at the University have created a negative environment for the effective teaching of medicine at The Ohio State University Hospitals. His activities in manipulating the University Hospitals policies, practices, and procedures are totally incompatible with advancing





the goals of this teaching hospital; instead he is apparently interested in only advancing his own personal gain.

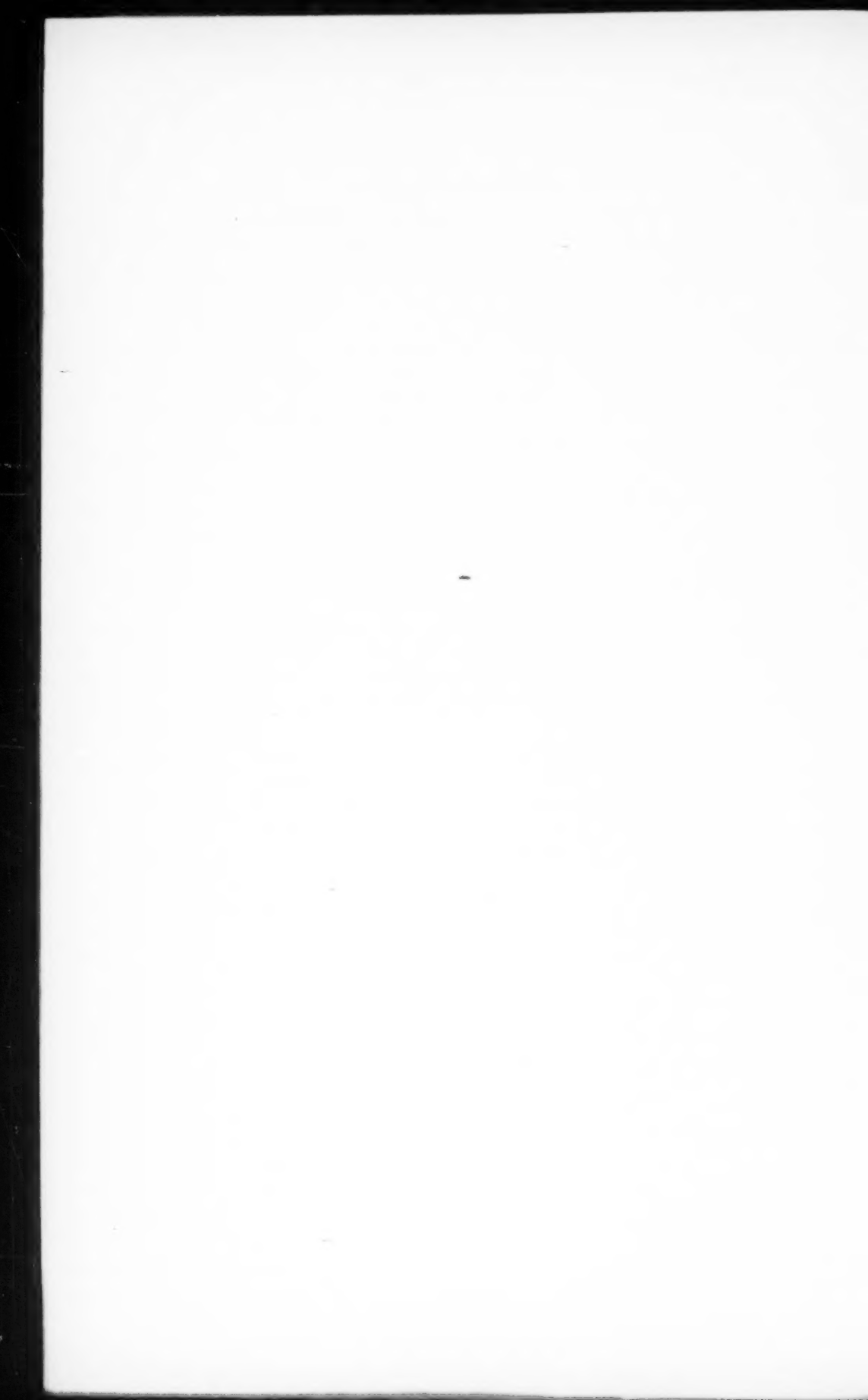
App. B, Attachment III at 1. Apart from this general statement, Dr. Carey went on to catalogue a series of more specific reasons which, he believed, supported his decision not to recommend Dr. Yashon's reappointment:

1. Dr. Yashon's participation in the training program in General Surgery and Neurologic Surgery including:
  - a. his continual efforts to achieve reinstatement as a member of the neurosurgery training program by disruptive and harassing means in direct contravention of his agreement as a part of a settlement in Federal Court and his failure to seek



reinstatement by  
the proper method  
agreed upon --  
requesting a  
hearing to  
determine his  
qualifications  
before at least  
three members of  
the Residency  
Review Committee;

- b. his persistence in  
admitting patients  
who he knows will  
require resident  
care despite the  
fact he is not a  
member of the  
neurosurgery  
training program;
- c. his total failure  
to provide proper  
and adequate  
direction for the  
care of his  
patients to the  
residents and  
nurses involved in  
the care of those  
patients;
- d. his failure to  
respond  
appropriately to a  
specific request of  
a resident that he  
come to the  
hospital and attend  
a patient;



- e. his attempts to hire residents to perform myelograms and other duties;
  - f. his failure to provide adequate supervision to residents.
2. Dr. Yashon's undesirable behavior which sets a bad example for house staff and students, including:
- a. his adding another faculty member as a consultant on a grant without permission of the faculty member;
  - b. his use of another faculty member's material in a publication without permission of the faculty member;
  - c. his unauthorized copying of the confidential charts of other physicians' patients;
  - d. his improper offering to pay clerical staff members of the



medical records  
department;

3. Dr. Yashon's rifling of departmental records and the unauthorized removal of confidential records, including confidential mortality and morbidity records, from another faculty member's office.
4. Dr. Yashon's admitting patients as "add-on" patients to take advantage of the admitting system, and to avoid the ceiling on admissions applicable to all surgeons when, in fact, the patients were not in an "add-on" state.
5. Dr. Yashon's improper use of medical charts by removing notations.
6. Dr. Yashon's arbitrary removal of patients of other physicians from beds in order to make room for his own patients, and his general disregard for census limitations.
7. While under summary suspension, Dr. Yashon's improperly arranging for the admission of patients.





8. Dr. Yashon's negative and abusive behavior such that neurosurgical residents have requested relief from working with him.
9. Dr. Yashon's verbally falsifying to the Chairman of the Department his operative surgery results. -
10. Dr. Yashon's seeking a faculty appointment of an associate for the sole purpose of private practice.
11. Dr. Yashon's improperly scheduling and performing neurosurgery without assistance or intensive care bed availability.
12. Dr. Yashon's failure to avail himself of appropriate appeal mechanisms within the University to resolve disputes.
13. Dr. Yashon's failure to discuss with a colleague a request for a consultation by a family.
14. Dr. Yashon's refusal to abide by legitimate rules regarding



supervision of surgery  
by residents.

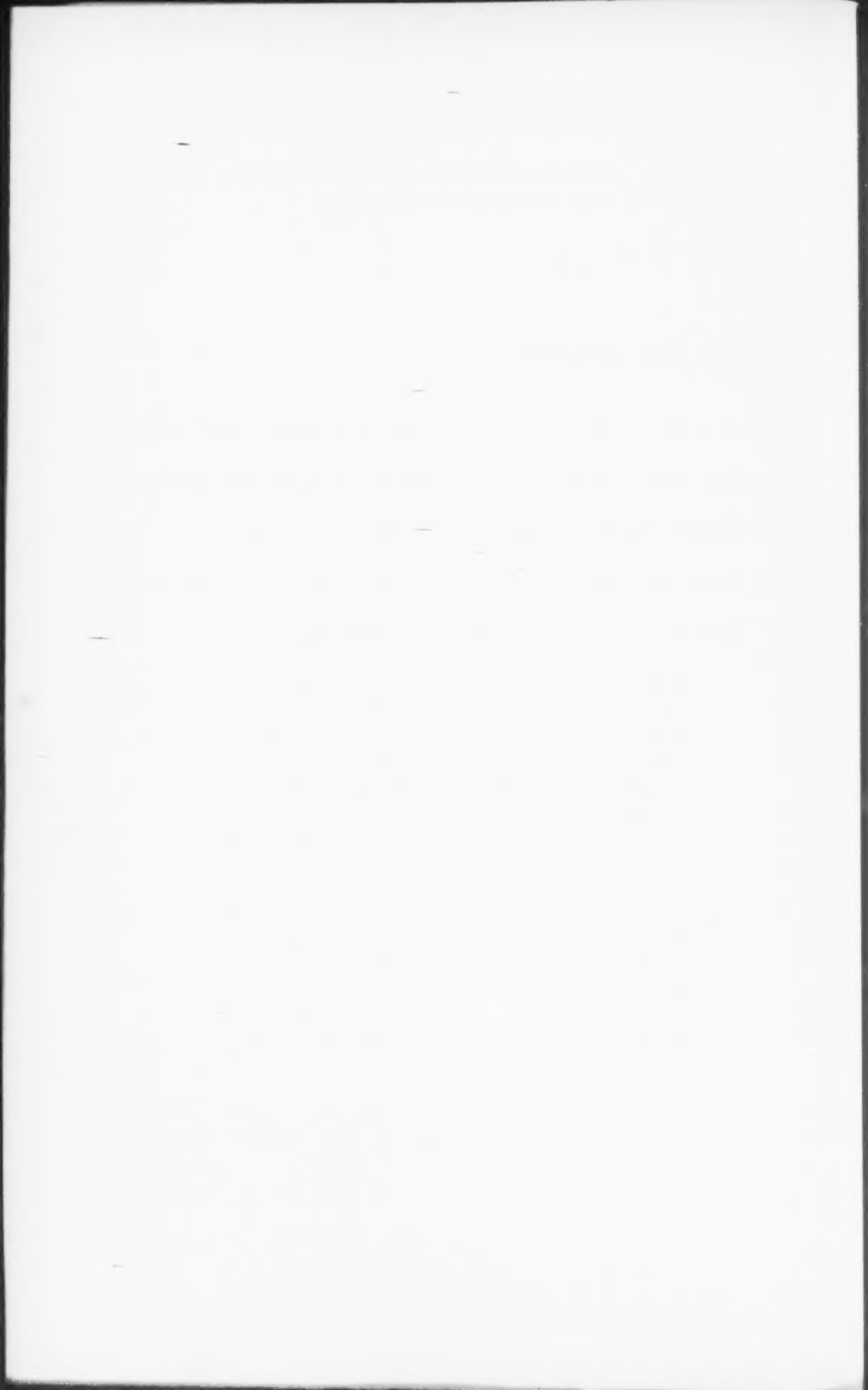
Id. at 1 - 3.

## 2. The Hearing

Dr. Michael E. Whitcomb, Chairman of the Medical Staff Administrative Committee, began the September 1 hearing with a brief explanation as to the purpose of the proceedings:

As you all know, our purpose here this morning is to review Dr. Yashon's application or request for reappointment to the medical staff. Dr. Carey, as you know, did not recommend reappointment, and our purpose today specifically is to hear Dr. Carey's reasons why he chose not to recommend reappointment of Dr. Yashon and to give David an opportunity to respond to whatever issues Larry may raise.

I would like to point out, this is not a court of law.



We have no absolute set guidelines in terms of the proceedings which we are compelled to follow, but our format will be such that I will ask Larry if he chooses and David if he chooses to make some initial comments . . . and then for Larry to present specific reasons why he chose not to recommend David to the staff and, as we go through the process, to allow David to respond to those point by point.

App. A at 4 - 5. Dr. Whitcomb also stressed

that our goal here today really is to deal with Dr. Yashon's request for reappointment. I think we should keep our discussions within that context. This is not the time for us to go far afield in dealing with other individuals or other things which are not relevant to appointment to the medical staff of the university hospitals and what that means in its entirety.

Id. at 6.

Consistent with these procedural guidelines, both Drs. Carey and Yashon



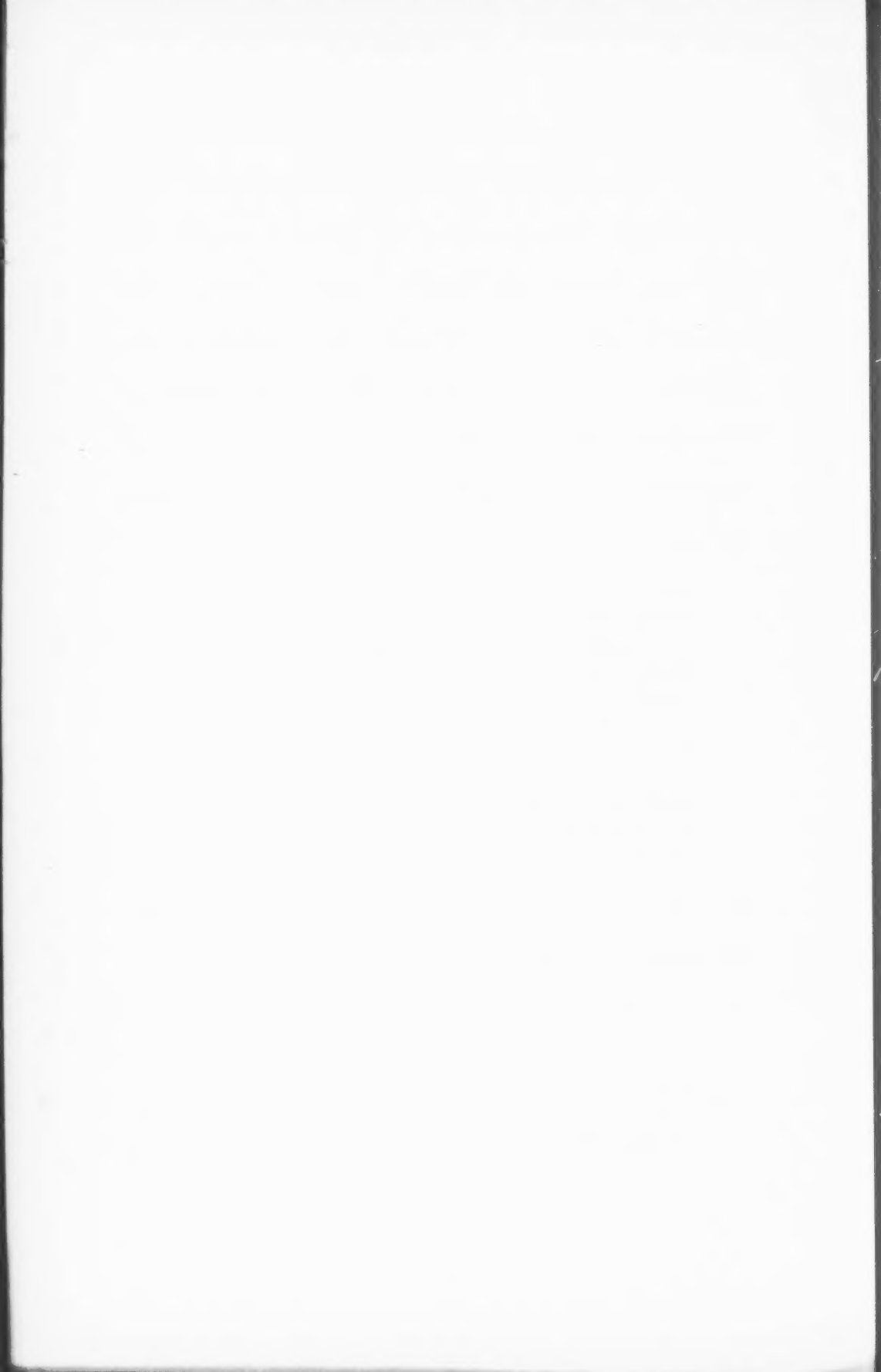
made opening statements. Dr. Carey, after presenting a brief outline of the Yashon I litigation, of the course of events that followed the filing of charges by him against Dr. Yashon in October, 1979, and of the events leading up to the September 1, 1981 hearing, explained that it was his intent

to provide evidence to this committee, that Dr. Yashon is an undesirable member of this hospital staff, that his conduct in a variety of arenas has been so bad that he should not continue to set an example for our students and our residents, nor to be involved in providing patient care in this institution.

Id. at 15. As to the witnesses and documentary evidence he would present, Dr. Carey cautioned that

I am in no position now, nor have I been in the past, to evaluate Dr. Yashon's competence as a

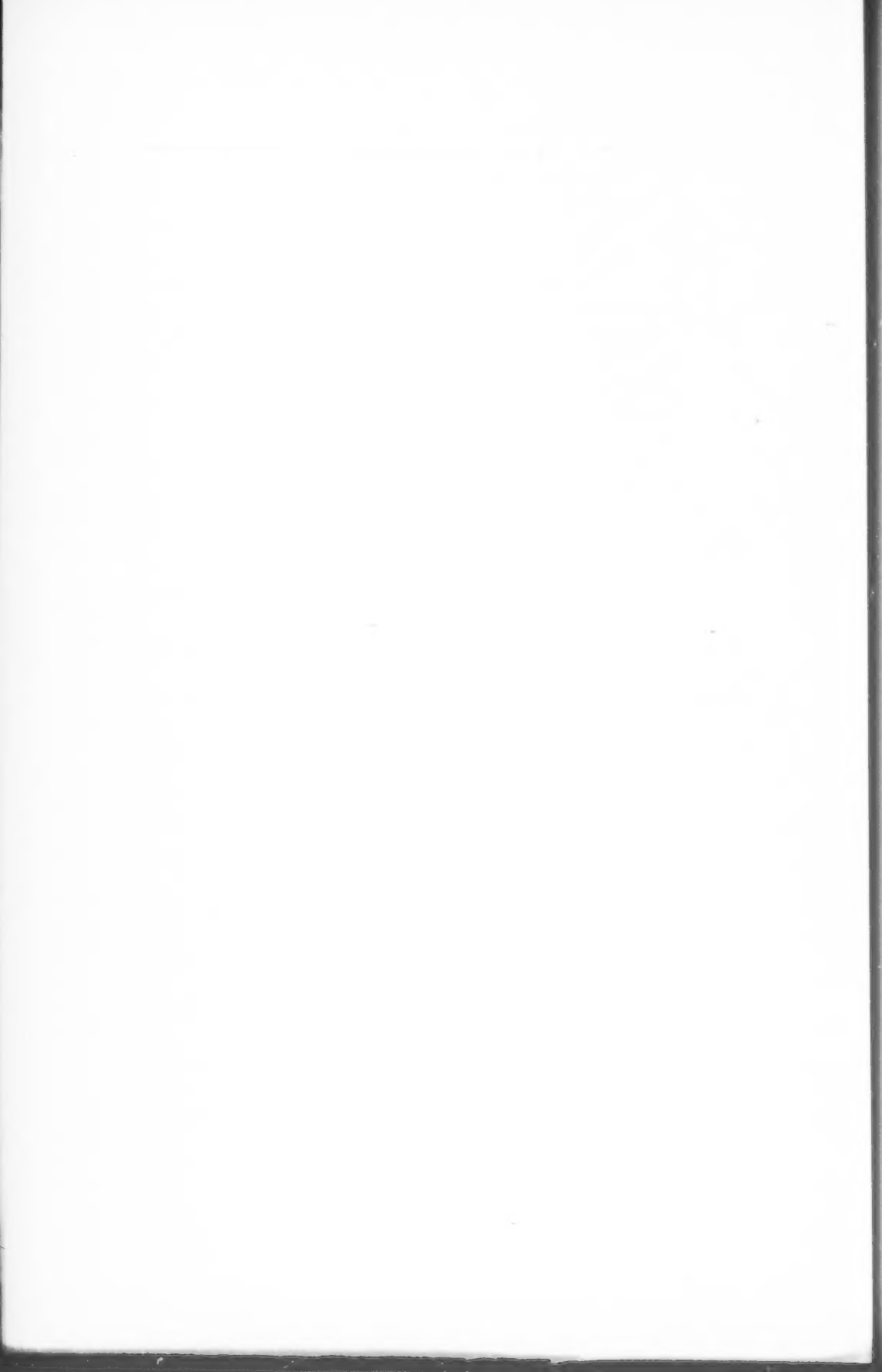




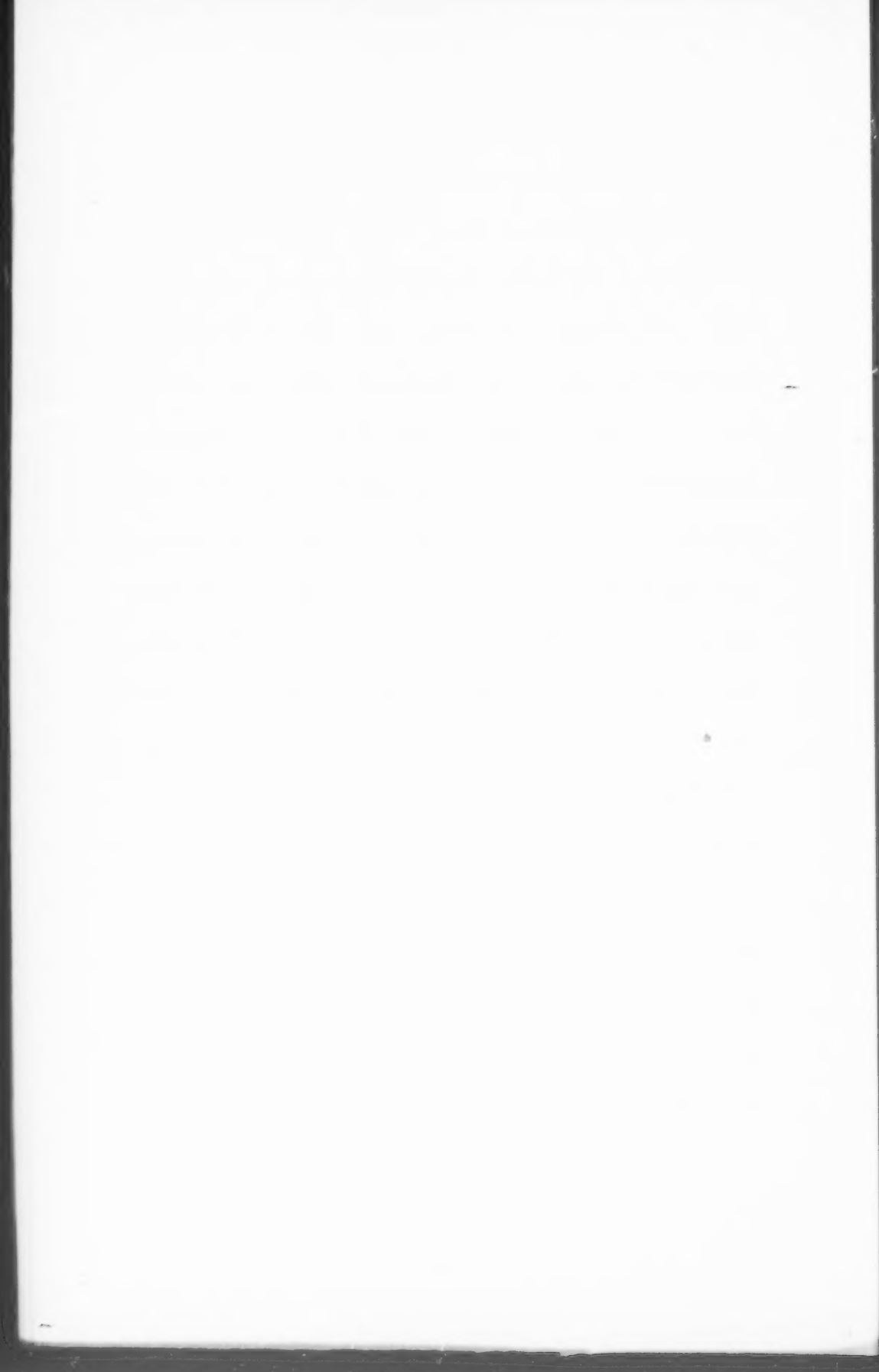
neurosurgeon. It is my opinion that can only be done by another neurosurgeon. But I believe I am in a position and have the responsibility of determining whether or not an individual in the Department of Surgery is competent to practice in this institution. That says little specifically about his competence as a physician. It says something about his propriety as a member of the staff of a teaching hospital.

Id.

Dr. Yashon, for his part, claimed that his experiences at Ohio State University had been most satisfactory until 1975, during which time differences arose between him and Dr. Hunt that caused him to leave Dr. Hunt's corporation and to set up his own practice corporation. Id. at 23 - 24. Since that time, both Drs. Hunt and Carey caused him numerous problems in executing his teaching and medical



practice duties. Id. at 24 - 25, 27. In addition, Dr. Yashon noted a number of objections to the format and substance of the hearing: that he had not received notice of Dr. Carey's intent to call witnesses (id. at 27 - 28); that most of the reasons - delineated in Dr. Carey's letter of August 14, 1981 to Dr. Tzagournis were previously reviewed and found groundless by a grievance committee (id. at 28 - 40); that he had an inadequate opportunity to prepare a response to those of Dr. Carey's charges that were not reviewed by the grievance committee (id. at 29 - 30); that the Medical Staff Administrative Committee was not the proper forum to review the charges made by Dr. Carey in his August 14, 1981 letter to Dr. Tzagournis (id. at 30); and that, as a



tenured faculty member, his membership on the attending medical staff could only be terminated by resort to the university procedures for detenurization (id. at 41 - 42, 46 - 47).

Dr. Carey then proceeded to call thirteen witnesses. The format with respect to each witness was basically the same; Dr. Carey would make some introductory remarks and would then direct questions to the witness. Dr. Yashon and the members of the committee would then have an opportunity to direct questions to the witnesses; throughout the hearing, moreover, members of the committee would direct questions to Drs. Carey and Yashon as well. Thus, both Drs. Carey and Yashon were themselves witnesses to some matters.



Upon a review of the testimony presented at the hearing of the Medical Staff Administrative Committee, the Court finds that testimony was presented as to the following charges in Dr. Carey's letter to Dr. Tzagournis:





<u>Charge</u>	<u>Witness</u>	<u>Transcript</u>
1(a)	Dr. Hunt	App. A at 314
1(b)	Dr. Hunt	App. A at 314-15
1(c)	Warren H. Leimbach, M.D. Ms. Karen Nedelka Rees Freeman, M.D.	App. A at 76-79 App. A at 87-90, 92 App. A at 160, 167-72, 174-75, 182-84, 199-202
	Kevin McGaharan, M.D. Stephen Hill, M.D. Dr. Hunt Dr. Yashon	App. A at 204 App. A at 220-25, 230 App. A at 315 App. A at 94-95, 192-98, 202-03
1(d)	Ms. Nedelka Dr. Freeman Dr. Yashon Dr. Goodman	App. A at 87-88 App. A at 161-67, 188-91 App. A at 176-80 185-88 App. A at 277-80



1(e)	Dr. Goodman Dr. Yashon	App. A at 300-02 App. A at 301-03
1(f)	Dr. Freeman  Dr. McGaharan Dr. Hill Dr. Goodman Carole A. Miller, M.D. Dr. Hunt Dr. Yashon	App. A at 160, 167-72, 174-75, 182-84 App. A at 206-08 App. A at 220, 230 App. A at 280-81 App. A at 262, 266-68 App. A at 315-16 App. A at 341-42
2(a)	Ronald St. Pierre, Ph.D.	App. A at 101-06, 111-114, 135-45, 147-48 App. A at 116-35
2(c)	Dr. Yashon  Dr. Goodman	App. A at 281-82
2(d)	Ms. Mary Lou McCartney Dr. Yashon	App. A at 234 App. A at 242
3	Dr. Carey	App. A at 243-45



Theodore Teterick, M.D.

Dr. Yashon

Dr. Hunt

Dr. Yashon

Dr. Carey

Dr. McGaharan

Dr. Hill

Dr. Goodman

Dr. Hunt

Dr. Carey

Dr. Yashon

Dr. Goodman

Dr. Yashon

Dr. McGaharan

Dr. Hill

Dr. Hunt

Dr. Yashon

App. A at 245-46,  
248-50

App. A at 246-54

App. A at 318-20

App. A at 333-35

App. A at 85

App. A at 206-08

App. A at 220-21

App. A at 274-76

App. A at 323-24

App. A at 237-39, 241

App. A at 240-41

App. A at 282-84

App. A at 333

App. A at 207-08

App. A at 220

App. A at 315-16

App. A at 341-42



Further, there was no testimonial evidence as to charges 2(b), 4, 6, 10, 11, and 12.<sup>22</sup>

All of the testimony relevant to Dr. Carey's charges against Dr. Yashon can be broken down into four categories: the charges as to which testimony was not challenged by Dr. Yashon; the charges as to which there was conflicting testimony, thus leaving committee members with the problem of weighing the credibility of the various witnesses; the charges as to which only conclusory testimony was presented; and the charges as to which Dr. Yashon probably could have presented witnesses on his behalf.

Under the first category, Dr. Yashon either did not deny the following charges or acknowledged the





conduct alleged, but denied that the conduct itself was improper: that he attempted to hire a resident to perform myelograms (charge 1(e)); that he, without authorization, copied the charts of another physician, that is, Dr. Goodman (charge 2(c)); that he improperly offered to pay a clerical staff member of the medical records department to pull charts for him (charge 2(d)); and that he improperly used a medical chart by removing from the chart the notation of another doctor, that is, Dr. Hunt (charge 5).

Under the second category, there was conflicting testimony as to a number of the charges; as to each of these, however, there was sufficient evidence from which members of the Medical Staff Administrative Committee could decide that the testimony against



Dr. Yashon was credible and that, therefore, the charges were meritorious.<sup>23</sup> Included in this category are the following charges: that Dr. Yashon failed to respond to the specific request of a resident, that is, Dr. Freeman, that Dr. Yashon come to the hospital and attend a patient (charge 1(d)); that Dr. Yashon added another faculty member, that is, Dr. St.Pierre, as a consultant on a grant application without his permission (charge 2(a)); that Dr. Yashon, without authorization, removed confidential medical records from the office of another faculty member, that is, Dr. Teterick (charge 3); that Dr. Yashon verbally gave Dr. Carey false figures as to his operative surgery results (charge 9); and that Dr. Yashon failed to discuss with a colleague,



that is, Dr. Hunt, a request for a consultation by a family (charge 13).

Under the third category, there was conclusory testimony as to a number of charges. As to both charges 1(a) and 1(b), Dr. Hunt summarily stated that Dr. Yashon had engaged in such conduct, but he offered no testimony as to any specific conduct.

Finally, under the last category, there are a number of charges as to which testimony was given that could justify a finding that the charges were meritorious; at the same time, the charges are of such a nature as to permit an inference that there are other witnesses whom Dr. Yashon might have called in support of his contention that the charges are groundless or that the charges are of slight importance. Included in this



category are the charges that Dr. Yashon totally failed to provide proper and adequate direction to the residents and nurses involved in the care of his patients (charge 1(c)); that Dr. Yashon failed to supervise residents adequately (charge 1(f)); that Dr. Yashon engaged in negative and abusive behavior such that neurosurgical residents have requested relief from working with him (charge 8); and that Dr. Yashon has refused to abide by legitimate rules regarding the supervision of surgery by residents (charge 14).<sup>24</sup>

### 3. Prior Disciplinary Actions

The Medical Staff Administrative Committee was aware that many of the charges as to which Dr. Carey provided



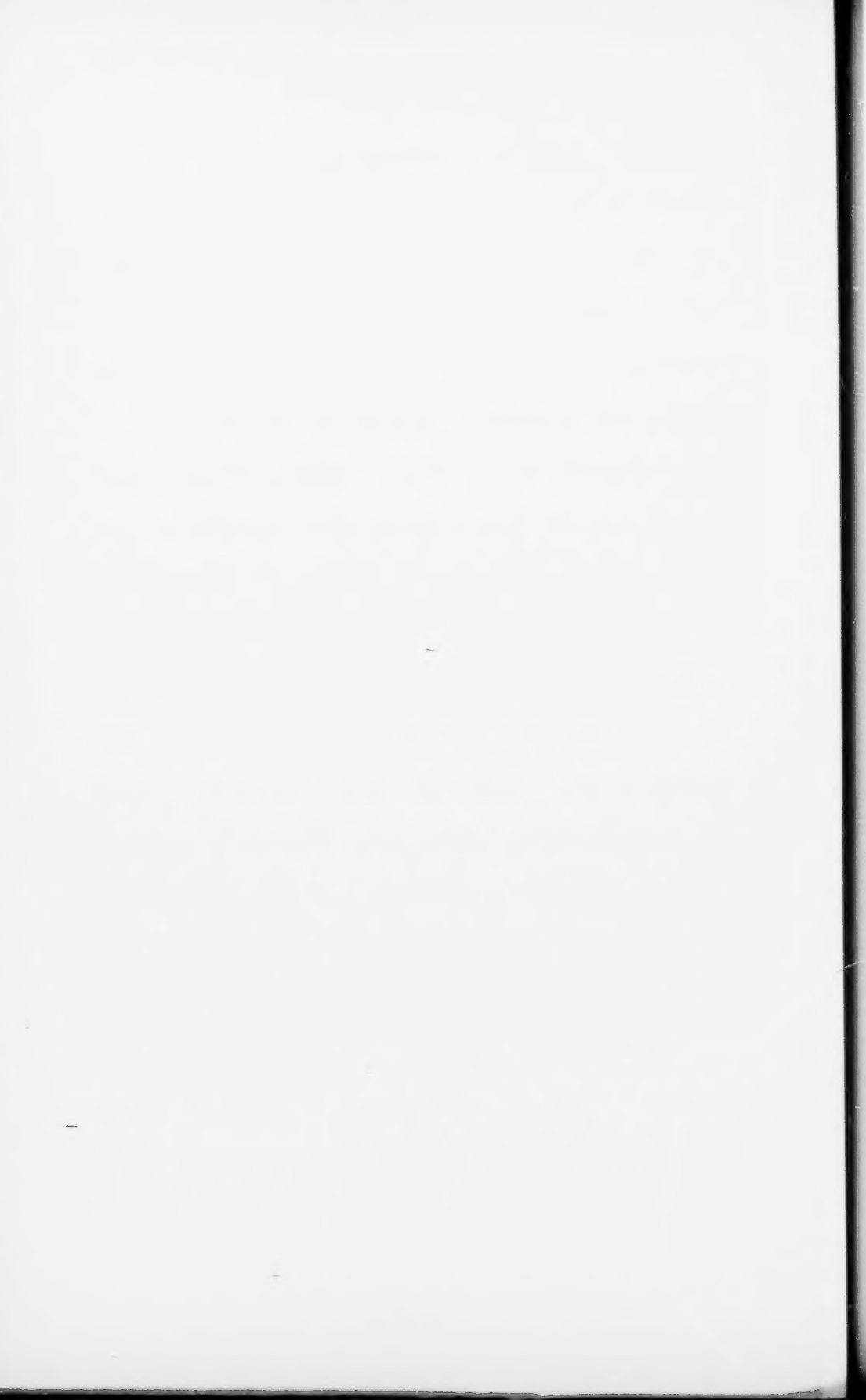


witnesses at the hearing had been the subject of prior disciplinary actions against Dr. Yashon. These disciplinary hearings had reviewed the charges that Dr. Yashon - had included, without authorization, the name of another faculty member as a consultant in a grant application; the charges in Dr. Carey's October 27, 1979 letter to Dr. Henry G. Cramblett, the then Dean of the College of Medicine, which charges, Dr. Carey believed, justified the removal of Dr. Yashon from the attending medical staff of University Hospitals; the charges which resulted in Dr. Carey's May 31, 1980 suspension of Dr. Yashon's admission and operating room privileges at University Hospitals; and the charge that Dr. Yashon had improperly removed a note



written by Dr. Hunt on a patient's chart.

The first charge, that Dr. Yashon had engaged in grave misconduct in including, without authorization, the name of another faculty member as a consultant in a grant application, was reviewed by Dr. Cramblett pursuant to the university rules governing detenurization.<sup>25</sup> After reviewing the complaint and the supporting documents, Dr. Cramblett concluded "that the allegations against Dr. Yashon, when taken together with Dr. Yashon's action in formally notifying NIH that Dr. St.Pierre's name should be withdrawn from the grant proposal, does not constitute grave misconduct as that term is defined in Rule 3335-5-04(A)7." App. A at 122. In



explaining his decision, Dr. Cramblett noted that he

regard[ed] the charge against Dr. Yashon as a serious charge. But the effect of this incident alone -- again, when taken with Dr. Yashon's notice to NIH -- is not such that it would seriously impair Dr. Yashon's effectiveness in meeting his defined teaching, service and research obligations.

Id. at 122-23. Accordingly, Dr. Cramblett dismissed the complaint.<sup>26</sup>

The second set of charges were those contained in Dr. Carey's October 27, 1979 letter to Dr. Cramblett. App. C at 3(C). These charges, most of which were also contained in Dr. Carey's August 14, 1981 letter to Dr. Tzagournis, allegedly justified Dr. Yashon's removal from the attending medical staff.



These charges were reviewed by an Investigation Committee of the Clinical Division of Surgery. Report of Investigation Committee (January 14, 1980). App. C at 2. The Investigation Committee reported:

It is the opinion of the committee that the incidents cited in the charges and the resultant intradepartmental relations have been disruptive. They have disrupted the medical care delivered in the Neurological Surgical Service of the University Hospital and have disrupted the administrative functions of the Neurological Surgical Service in the Clinical Division of Surgery. They have disrupted the Post MD teaching activities of the Neurological Surgical Service in the Clinical Division of Surgery. Moreover the committee feels that the situation has been allowed to continue too long and that disciplinary action should be taken to prevent further disruption.

We have arbitrarily divided the charges into three





groups: disruptive behavior, unprofessional conduct, and clinical incompetence. We regret to say that there are other examples of most of the incidents representing disruptive behavior and unprofessional conduct in which other persons on the hospital staff have been participants. It appears that the charges against Dr. Yashon were made on the basis that the frequency was greater than for other members of the hospital staff. We have no evidence to support this concept since the general frequency of similar incidents is not available. Dr. Yashon was able to document that some of his behavior was similar to that of his accusers in more than one instance. Although significant suggestions of clinical incompetence were made, no one whom we interviewed was prepared to state that Dr. Yashon was an incompetent clinician. In fact, some indicated that he was very competent. This committee does not feel qualified to measure his clinical competence. We feel, however, that this is the most serious charge apparent in our investigation and it should be reviewed. This should be done by



individuals in the field of neurosurgery from outside of the University since it is our opinion that an unbiased evaluation of the current hospital staff would be improbable due to the chronicity of the problem. Dr. Yashon should have input to the selection of his reviewers.

In summary, we feel that the charges are substantial and the disruption caused by the incidents is obvious. We have been unable to find the cause or to place blame. The significance of the suggestion of incompetence is self-evident and action should be taken to settle this for the welfare of the patients and the institution.

Id. Based on this report of the Investigation Committee, Dr. Luther M. Keith, Jr., Vice-Chairman of the Department of Surgery wrote to Dr. Cramblett, Dean of the College of Medicine, and recommended that he take appropriate disciplinary action against Dr. Yashon or submit the matter for



further investigation and consideration by a grievance committee as provided by Article V Section 3 of the constitution, bylaws, rules and regulations of the medical staff of University Hospitals. App. C at 1.<sup>27</sup>

Dr. Cramblett evidently chose the second option in that a grievance committee was convened to review Dr. Carey's charges. In a report dated July 24, 1980, the committee, composed of five doctors, found that there was no basis for the charge that Dr. Yashon was an incompetent surgeon, that there was no evidence to support the contention that Dr. Yashon was responsible for the disruptive atmosphere within the Division of Neurologic Surgery, and that there was no validity to the charge that Dr. Yashon was responsible for the



resignation of residents and for difficulty in resident recruitment. App. C at 4. The grievance committee, moreover, found that Dr. Yashon had been unfairly harassed by Drs. Carey and Hunt and recommended that Dr. Yashon be restored to all his rights and privileges as a member of the attending medical staff of University Hospitals. Id. Despite the request of Dr. Tzagournis, the then Associate Dean of the College of Medicine, that the grievance committee supply him with additional information to support its findings, App. C at 5, the grievance committee merely reaffirmed its findings and conclusions, while noting that "[a]ll evidence was obtained and reviewed impartially and objectively as well as in complete confidence." App. C at 6.<sup>28</sup>





On September 30, 1980, Dr. Tzagournis notified Dr. Yashon of his decision as to the charges raised by Dr. Carey. Having reviewed the recommendations of the Investigation Committee and of the Grievance Committee, Dr. Tzagournis determined that

[t]he preponderance of evidence indicates that your activities and professional conduct are considered to be disruptive to your clinical division and University Hospitals. Numerous incidents over several years caused considerable concern to members of the Medical Staff, the non-M.D. staff of University Hospitals, and the Administration. In fact, the training program in Neurosurgery was seriously jeopardized by some of these actions.

It is, of course, very difficult to assign a primary responsibility for each of many incidents, occurring in a milieu of chronic conflict over such an extended period of time. However, I am



persuaded that you are responsible for much of the conflict and disruption which has occurred.

My task is to decide whether grounds for corrective action are substantiated. In view of the conflicting recommendations and opinions available to me, I conclude that they are not sufficient to justify a curtailment or reduction of your clinical privileges but they are sufficient to justify a strong reprimand for your disruptive behavior and activities. Subject to the provisions of the corrective procedures of University Hospitals, this reprimand will become a part of your file.

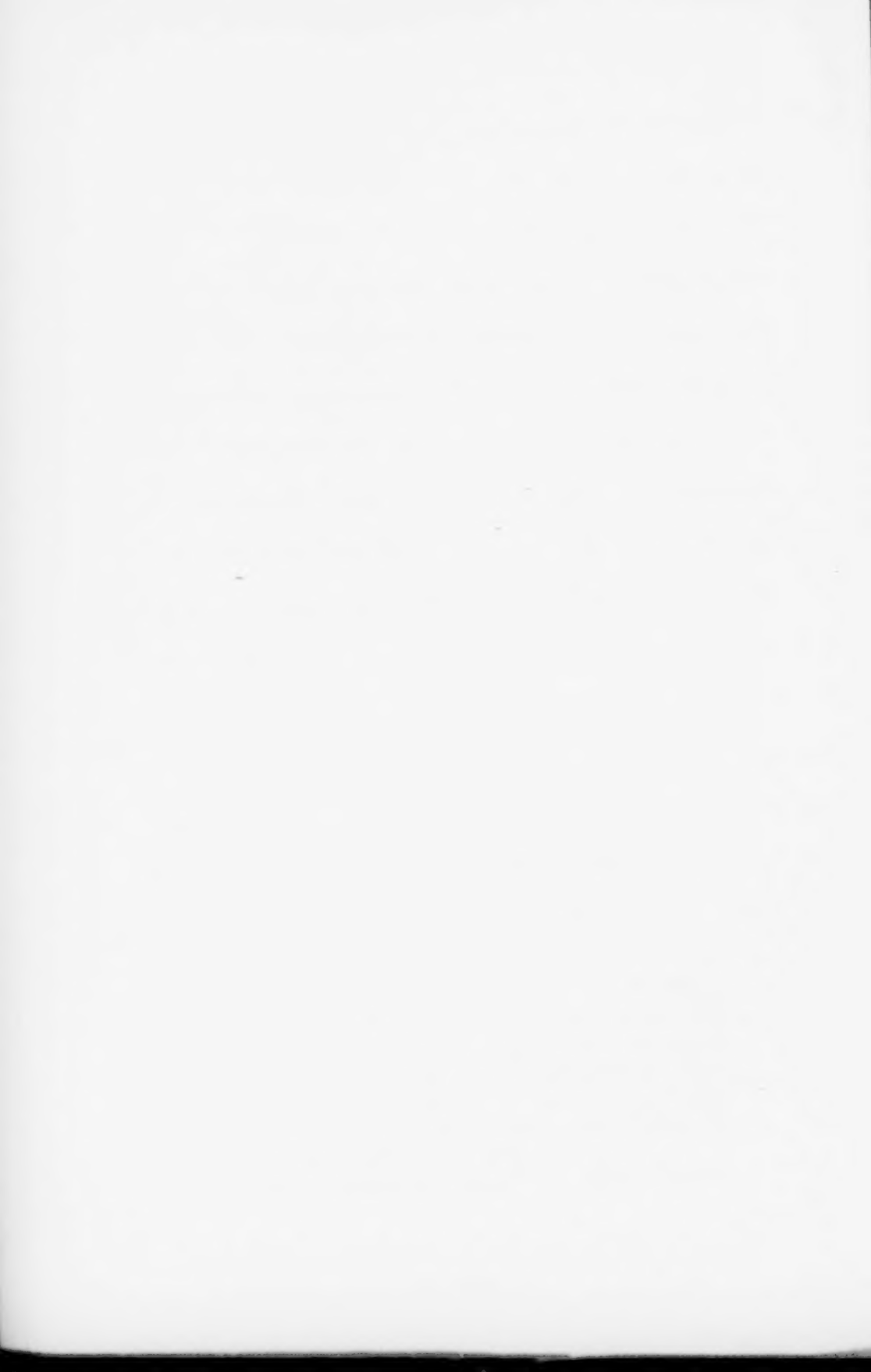
App. C at 7. Pursuant to Article VI of the constitution, bylaws, rules and regulations of the medical staff of University Hospitals, Dr. Yashon appealed the reprimand to Dr. Cramblett, asking that the reprimand be voided and, if not, that the reprimand



be further appealed pursuant to Article VI. App. C at 8.

On October 22, 1980, Dr. Tzagournis, the then Acting Dean of the College of Medicine, wrote to Dr. Yashon and informed him that, pursuant to his request to Dr. Cramblett, the Executive Committee would conduct a hearing on November 2, 1980 to hear Dr. Yashon's appeal of the reprimand. App. C at 9. Dr. Tzagournis made clear that the Executive Committee could confirm, modify, or reject his decision to issue a reprimand; he also specified the charge that would be before the Executive Committee:

The charge against you is that your activities and professional conduct over the past five years have violated the standards of the medical staff and have been disruptive to your clinical division and University Hospitals. Your conduct on



numerous occasions have caused concern to members of the Medical Staff, the non-M.D. staff and the Administration of University Hospitals.

Id. The letter specified fifteen more specific charges to support this general charge; these fifteen charges had appeared in Dr. Carey's original charges of October 27, 1979, see App. C at 3(C) and supporting documents, and many of them were subsequently reiterated in Dr. Carey's August 14, 1981 letter to Dr. Tzagournis, see App. B, Attachment III. When Dr. Yashon elected to withdraw his appeal of the reprimand, the Executive Committee did not hold its hearing. Yashon II, Plaintiff's Motion for Preliminary Injunction at 13.<sup>29</sup>

In addition, the Medical Staff Administrative Committee had knowledge





of a third charge against Dr. Yashon that had been the subject of a previous disciplinary hearing. On May 31, 1980, Dr. Carey had notified Dr. Yashon that, because of the events surrounding the Brumfield incident,<sup>30</sup> he was suspending his admission and operating room privileges. Dr. Yashon appealed this decision to the Executive Committee of the Medical Staff of University Hospitals. On June 26, 1980, Dr. Cramblett notified Dr. Yashon that he had received the written report of the findings and decision of the Executive Committee;<sup>31</sup> he advised Dr. Yashon that

[t]his letter constitutes your official notice, . . . , of my acceptance of the decision of the Executive Committee. Thus, you are hereby notified that the summary suspension of your admission and operating room privileges invoked May 31, 1980 is no longer effective,



and that your privileges are hereby reinstated.

See Yashon II, Exhibits 23, 24, 25, appended to Dr. Yashon's affidavit in support of plaintiff's motion for preliminary injunction.

Finally, the Medical Staff Administrative Committee had notice in the record before it that other charges by Dr. Hunt against Dr. Yashon had been reviewed by a committee of four doctors. In its letter of March 13, 1979, the committee, composed of four doctors (three members and one alternate) reported to Dr. Carey that it had considered two charges, one of which was that Dr. Yashon had engaged in "improper and presumably illegal conduct" by removing a note written by Dr. Hunt from a patient's chart. App. C at 3(C)(4). As to this charge, the

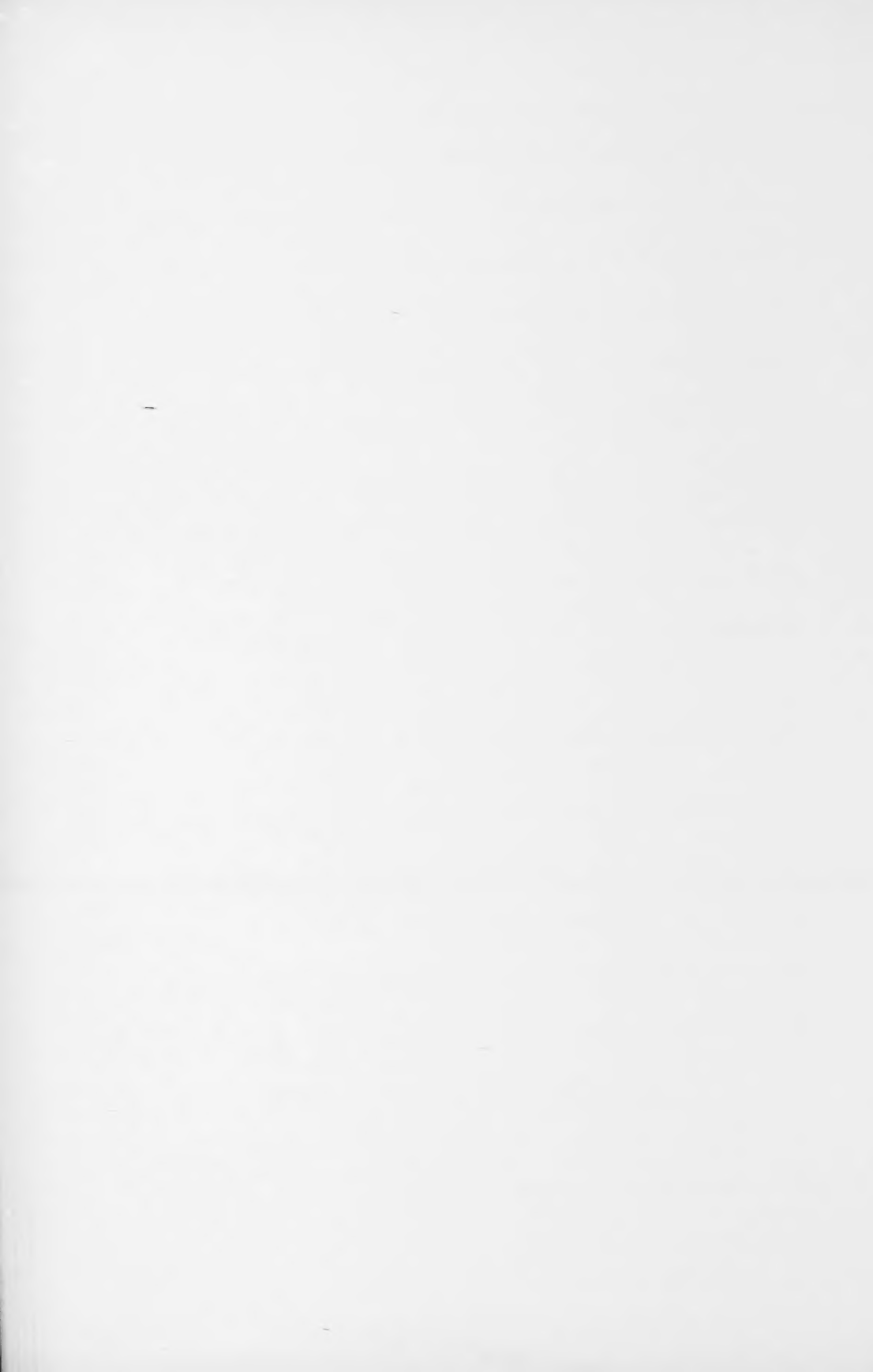


committee noted that "[w]e do believe this is improper conduct, i.e. the removal of a note from the patient record, but do not feel that we are in any position to rule on the legality of this matter." Id. Apart from the report of this committee, there is no indication in the record as to whether any further action was taken as to these charges by Dr. Hunt.<sup>32</sup>

#### 4. Decision of the Committee

After the conclusion of the hearing, the members of the Medical Staff Administrative Committee deliberated. The minutes of the meeting state:

The open hearing adjourned at approximately 5:30 p.m. At 5:45 p.m., members of the Committee reconvened to deliberate and vote on the



issue before the Committee. Dr. Carey, although a member of the Committee, was not present during the deliberations and voting. Dr. Tzagournis and Dr. Yashon also were not present. The deliberations and voting were not recorded by the court reporter. After discussion among the members present, a motion was made and seconded that Dr. Yashon not be reappointed to the Attending Staff of The Ohio State University Hospitals. Voting was done by secret ballot. As Chairman of the Committee, Dr. Whitcomb did not vote. The votes were counted by two members of the Committee. The Committee members voted 13 to 4 in support of the motion, and thus, voted to reject Dr. Yashon's request for reappointment to the Attending Staff of The Ohio State University Hospitals.

App. B, Attachment IV to the September 3, 1981 letter of Dr. Whitcomb. Though the decision of the committee was clear, the minutes do not reflect any specific findings of the committee as to any of the charges in Dr. Carey's





August 14, 1981 letter to Dr.  
Tzagournis.

5. Administrative Rules Governing  
University Hospitals

Essential to an understanding of the due process questions raised by Dr. Yashon is a review of the administrative structure of University Hospitals and of the bylaws that have been approved by the Board of Trustees of the Ohio State University [hereinafter Board of Trustees].

Dr. Yashon's counsel has filed an affidavit in which he explains:

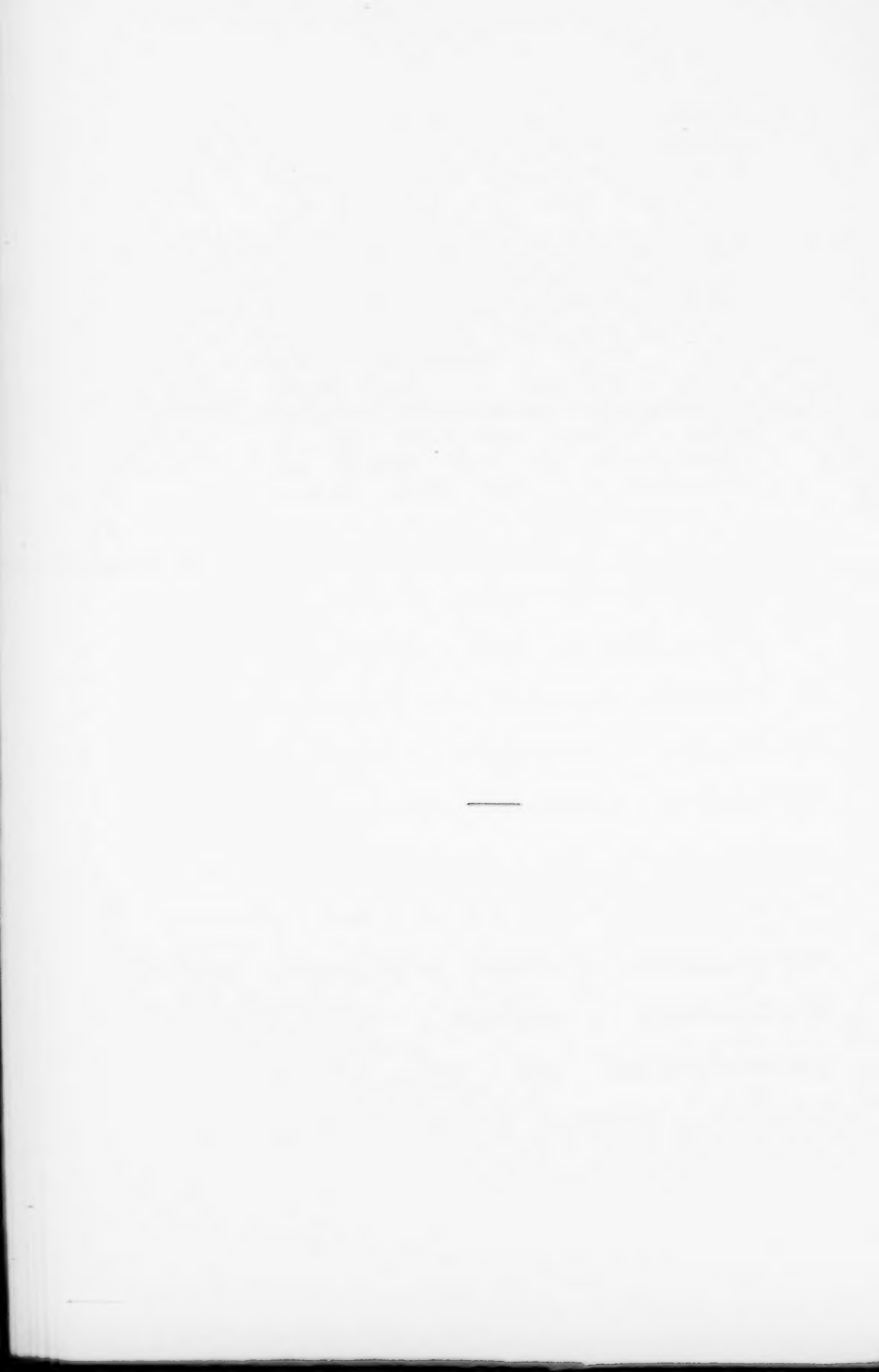
On November 30, 1979, the Board of Trustees of The Ohio State University, by amending Section 3335-1-03 of the Ohio Administrative Code, created the University Hospitals Board; the function of said University Hospitals Board is to govern The Ohio State University Hospitals,



including appointments and reappointments to the medical staff. Attached hereto is a true and complete copy of the bylaws of the University Hospitals Board of The Ohio State University, which bylaws comprise Chapters 3335-93 through 3335-103 of the Ohio Administrative Code. Bylaws of the said University Hospitals Board were first approved by a resolution of the Board of Trustees of The Ohio State University adopted on May 2, 1980.

Janata Affidavit at ¶7.

Since May 2, 1981, when the Board of Trustees approved the bylaws of the University Hospitals Board, the University Hospitals Board has been vested with the responsibility for "[a]pproval of medical and dental appointments, clinical privileges, and disciplinary actions upon the recommendation of the appropriate official, subject where required to



final action of the Ohio State University board of trustees." Section 3335-93-02(F) of the Ohio Administrative Code.<sup>33</sup> In making its determination as to whether to appoint a particular physician to the attending medical staff, the University Hospitals Board can rely on the recommendations of two committees established under its bylaws, that is, the Joint Conference Committee and the Medical Staff Administrative Committee.<sup>34</sup>

The bylaws of the University Hospitals Board delineate the minimal requirements for membership on the attending medical staff as well as the duration of an appointment to the medical staff:

Upon recommendation of the medical staff and in accordance with the medical staff bylaws, the board may appoint faculty members who



are graduates of recognized medical and dental schools, meeting the qualifications prescribed in the medical staff bylaws, to membership on the medical staff of the hospitals and shall grant clinical privileges to such persons, subject to ratification of the Ohio State University Board of Trustees. Appointment to the medical staff carries with it full responsibility for the treatment of individual hospital patients subject to such limitations as may be imposed by the board or the bylaws, rules, and regulations of the medical staff. Appointments to the medical staff shall be for one year, renewable each year in accordance with the reappointment procedure set forth in the medical staff bylaws. Reappointments to the medical staff will be made annually by the board, and shall be for one year.

Section 3335-101-05 of the Ohio Administrative Code [emphasis added]. Thus, it is clear that an appointment or reappointment to the attending medical staff is for one year; these





bylaws do not provide for any automatic reappointment to the attending medical staff. The language of this section, moreover, is permissive; that is, there is no requirement that the University Hospitals Board appoint (or reappoint) a physician to the attending medical staff despite the fact that he meets the minimal requirements of Section 3335-101-05 and any qualifications prescribed in the bylaws of the medical staff.

The Court's resolution of the pending case is rendered more difficult by the fact that, to date, neither the University Hospitals Board nor the Board of Trustees has approved bylaws for the medical staff of University Hospitals, Janata Affidavit at ¶8, despite the fact that such approval is mandated by Section 3335-101-04 of the



Ohio Administrative Code.<sup>35</sup> Thus, absent any approved bylaws of the medical staff, the only rules governing qualifications for membership on and appointment (and reappointment) to the attending medical staff are those contained in Section 3335-101-05.<sup>36</sup>

Finally, the bylaws of the University Hospitals Board seek to define the relationship between University Hospitals and the health sciences, academic and research programs of The Ohio State University:

The health sciences colleges of the university carry out a significant portion of their educational and research activity in university hospitals. Although the board has not been delegated specific responsibilities for academic programs, it shall lend its best efforts to assure that the programs of the health sciences colleges are effectively supported in collaboration with the hospitals patient care



programs. The vice president for health sciences shall be charged with maintaining an effective liaison between the health sciences colleges and the hospitals board to assure excellence in both academic and patient care programs.

Section 3335-99-01 of the Ohio Administrative Code [emphasis added]. These bylaws, at least, make clear that the University Hospitals Board does not have any "specific responsibilities" for academic programs at The Ohio State University, including those of the College of Medicine.

C.

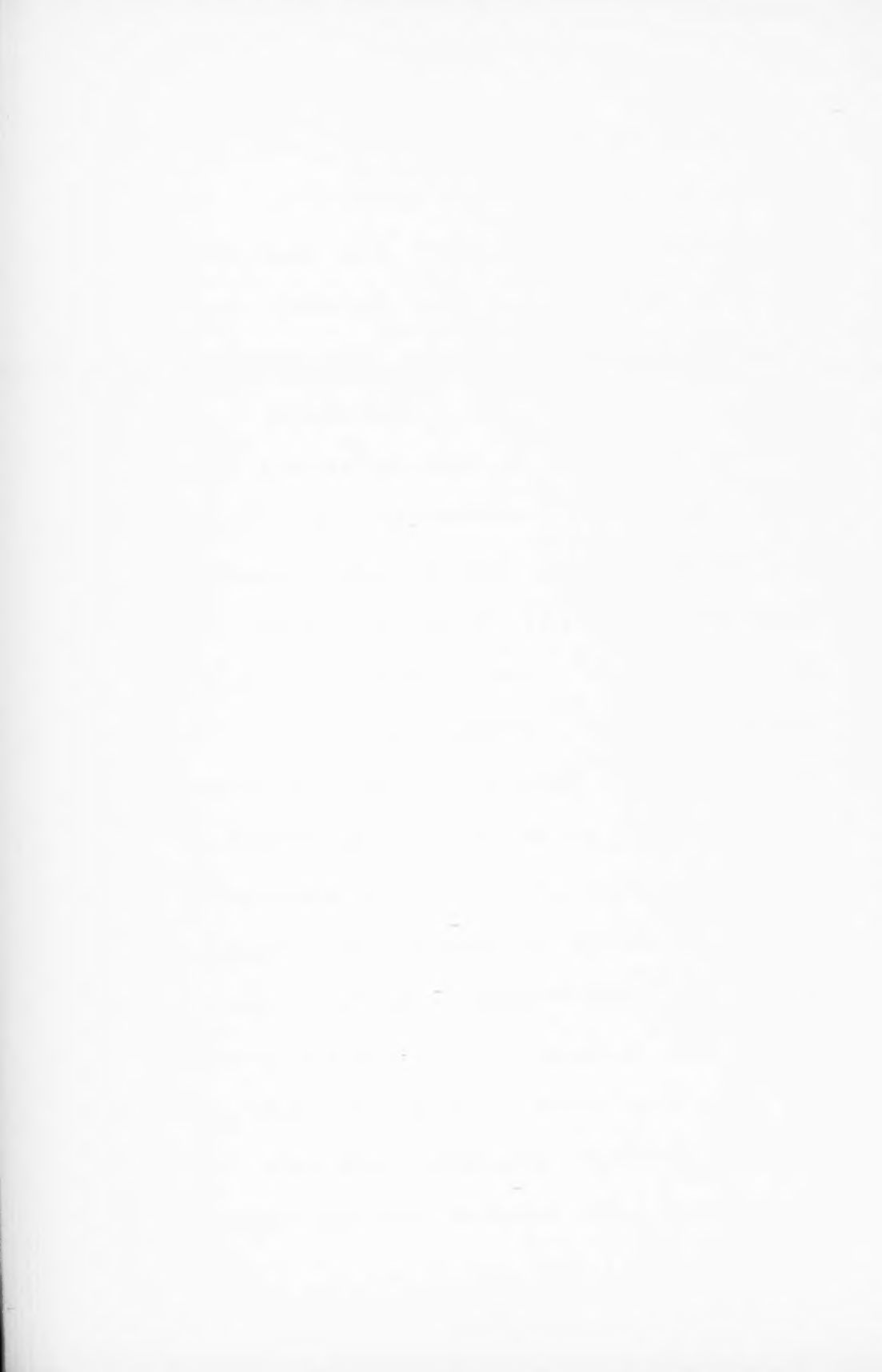
The defendants have now moved the Court to vacate the consent order, insofar as it provided for Dr. Yashon's continued membership on the attending medical staff at University Hospitals,



and for summary judgment on Dr. Yashon's claims in the complaint. The defendants believe that the September 1, 1981 hearing of the Medical Staff Administrative Committee afforded Dr. Yashon all of the procedural due process to which he was entitled; they urge the Court, therefore, to vacate the consent order and to grant summary judgment, thus allowing to stand the decision of the Medical Staff Administrative Committee not to reappoint Dr. Yashon to the attending medical staff of University Hospitals.

Dr. Yashon has filed a memorandum contra in which he urges the Court to deny the defendants' motion for a number of reasons. Dr. Yashon argues (1) that the principles of res judicata and collateral estoppel preclude the defendants from denying his application





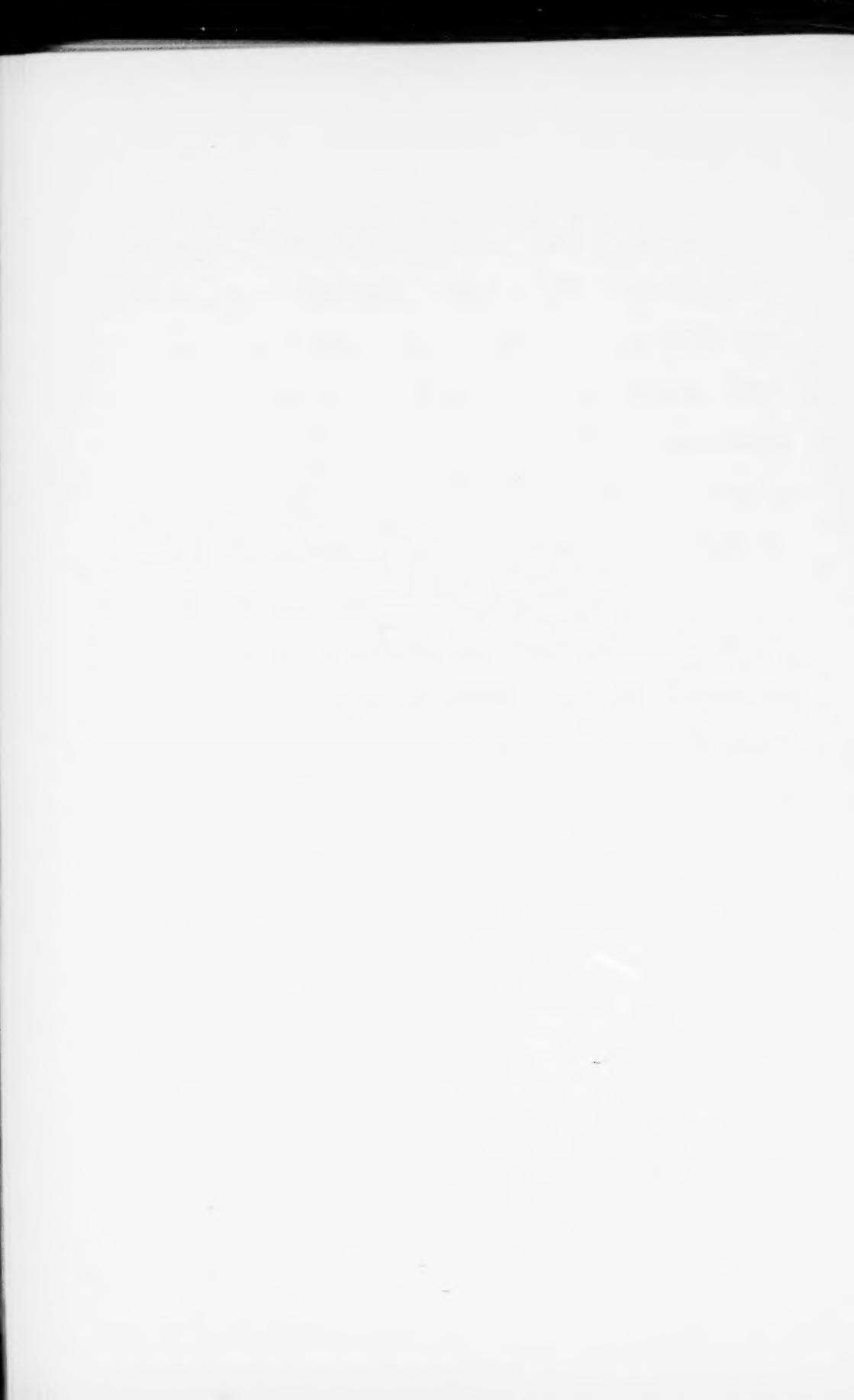
for reappointment because of matters that were the subject of prior disciplinary proceedings; that the format of the Medical Staff Administrative Committee hearing did not comply with this Court's instructions; that the hearing violated his rights to substantive and procedural due process; that the defendants have failed to comply with the bylaws of the University Hospitals Board; and that there are genuine disputes as to material facts which renders summary judgment inappropriate. The Court will now direct its attention to each of these matters.

1. Res Judicata and Collateral Estoppel

As the Court has previously



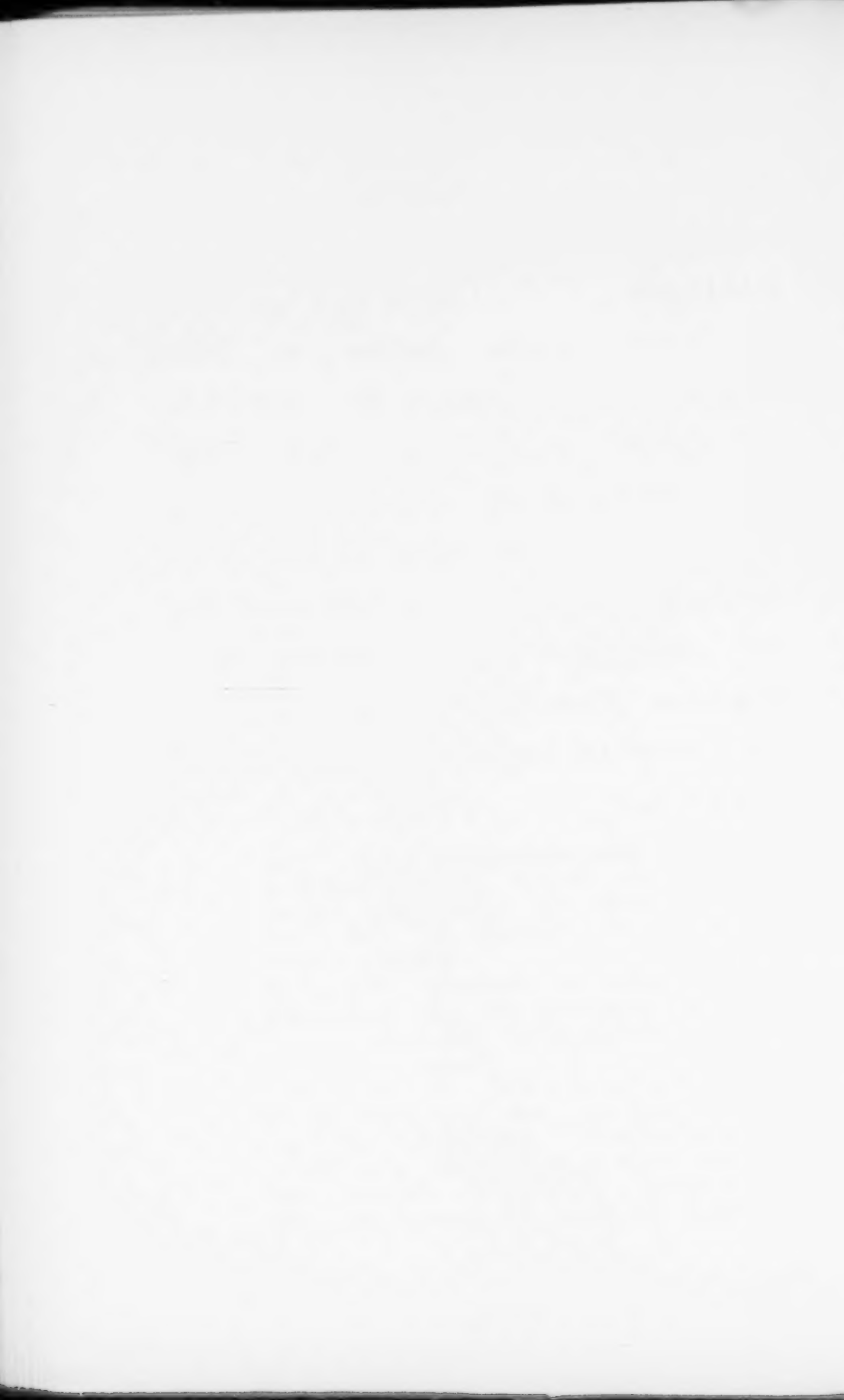
explained, the charges that were considered by the Medical Staff Administrative Committee included some that were specifically considered by previous disciplinary hearings. The prior disciplinary hearings had considered the charges delineated in Dr. Carey's October 27, 1979 letter to Dr. Cramblett and the matters that had resulted in Dr. Carey's May 31, 1980 summary suspension of Dr. Yashon's admission and operating room privileges. The first of these disciplinary proceedings had not resulted in the curtailment or termination of Dr. Yashon's privileges as a member of the attending medical staff at University Hospitals; similarly, the second disciplinary hearing resulted in a finding that there was not sufficient cause for Dr.



Carey's summary suspension of Dr. Yashon's admission and operating room privileges.

Citing United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966), Dr. Yashon contends that the principles of res judicata and collateral estoppel apply to the prior disciplinary proceedings and precluded the Medical Staff Administrative Committee from considering the facts that were the subject of these prior proceedings:

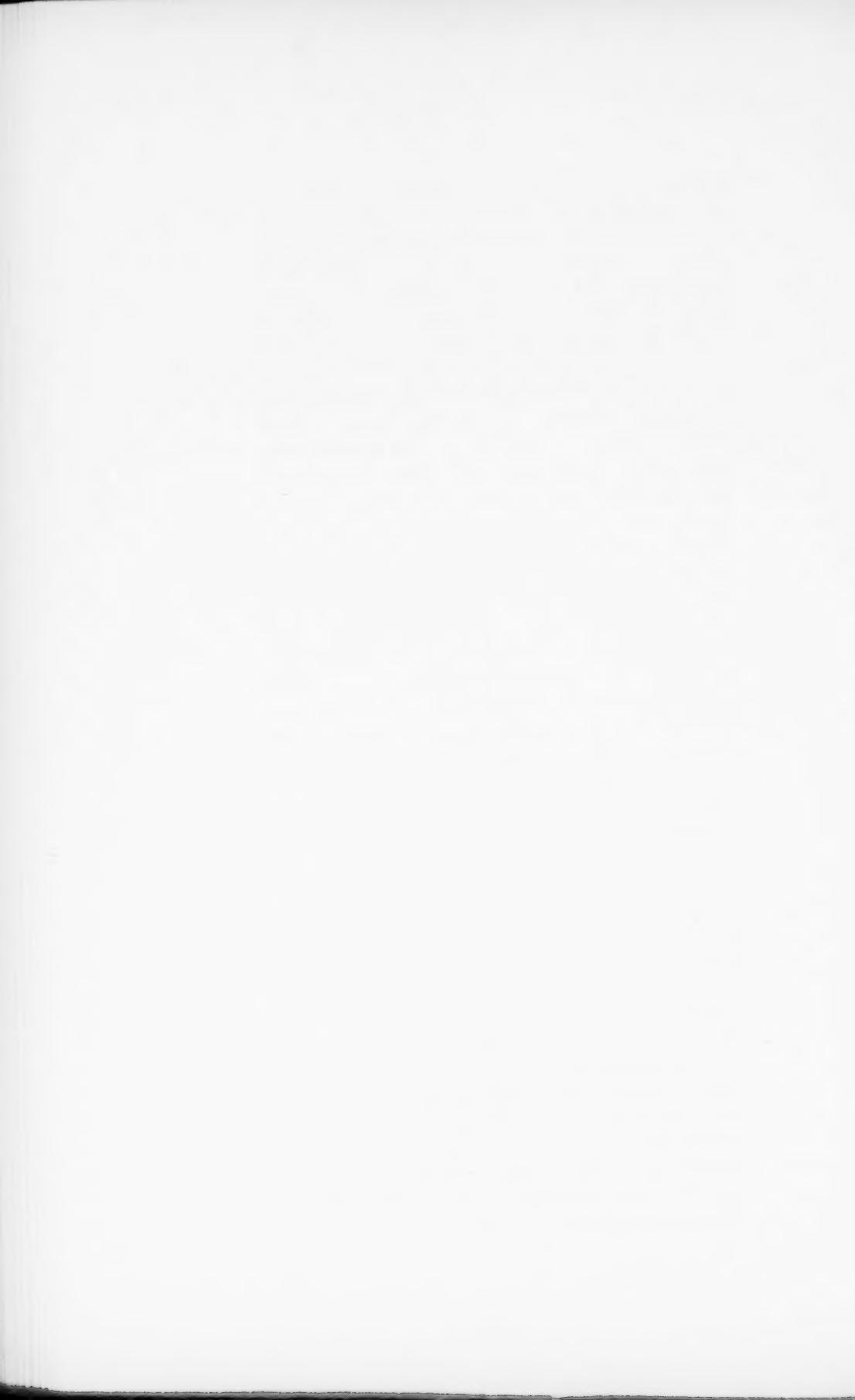
The consideration by the Medical Staff Administrative Committee of incidents which were the bases of the two prior disciplinary proceedings clearly violated the doctrine of res judicata and collateral estoppel. In both of these prior proceedings and in the 1981 proceeding the parties were identical: defendant Carey, who was prosecuting plaintiff Yashon, plaintiff Yashon and the College of Medicine. In



both of these prior proceedings and in the 1981 proceeding the issues were the same: did certain incidents occur, and if so, did those incidents justify a curtailment or suspension of plaintiff Yashon's medical staff privileges. In both of those prior proceedings and in the 1981 proceeding various bodies of the College of Medicine were acting in a judicial capacity. [Citation omitted.] Because both prior disciplinary proceedings terminated without a reduction or suspension of plaintiff Yashon's medical staff privileges, the incidents litigated in those prior proceedings may no longer be used by defendant Carey and the College of Medicine to strip plaintiff Yashon of such privileges.

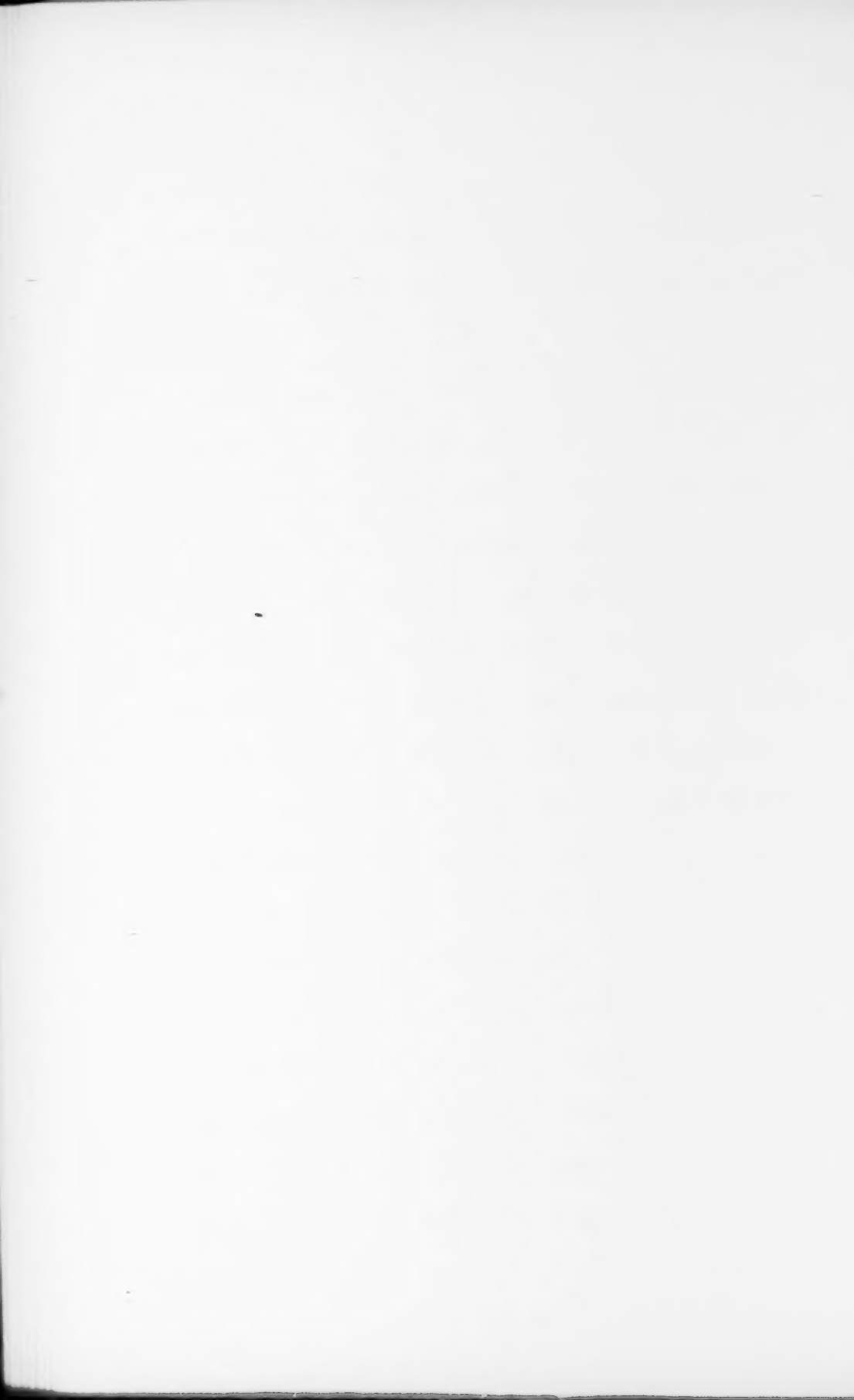
The Medical Staff Administrative Committee in effect reheard the two prior disciplinary proceedings. The principle of finality of administrative decisions, which principle is represented by the twin doctrines of res judicata and collateral estoppel, bars defendants from again considering the facts which were the subject of the prior proceedings. \* \* \*





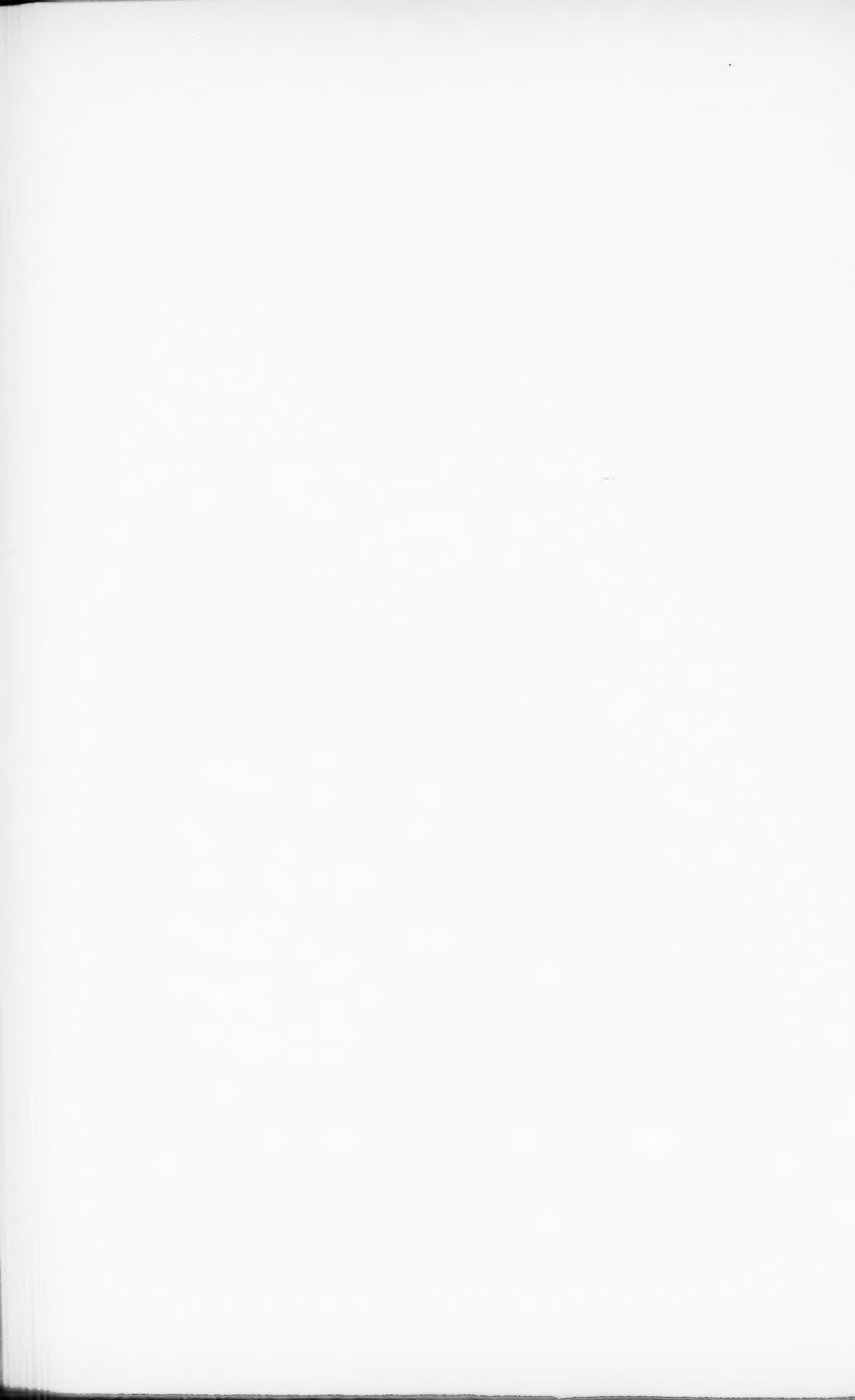
Plaintiff David Yashon, M.D.'s  
Memorandum in Opposition to Defendants'  
Motion to Vacate Consent Order and for  
Summary Judgment at 15. -

As an initial matter, the Court  
notes that United States v. Utah  
Construction and Mining Co., supra, and  
the other cases cited by Dr. Yashon,  
Pettus v. American Airlines, Inc., 587  
F.2d 627 (4th Cir. 1978); A. Duda &  
Sons Cooperative Assn. v. United  
States, 495 F.2d 193 (5th Cir. 1974);  
International Wire v. Local 38,  
International Brotherhood of Electrical  
Workers, 475 F.2d 1078 (6th Cir. 1973),  
all involved the question of whether  
"judicial proceedings may be precluded  
by administrative decision." Wright,  
Miller & Cooper, Federal Practice and  
Procedure: Jurisdiction §4475 at  
764-65 [emphasis added]. This is



fundamentally different from the question posed by the facts in this case, that is, whether the principles of res judicata and collateral estoppel apply to successive proceedings before different administrative groups at University Hospitals.

Based upon the record before it, the Court is of the opinion that the principles of res judicata and collateral estoppel did not bar the Medical Staff Administrative Committee from considering charges that had previously been considered by other disciplinary bodies. This determination rests upon a number of factors. First, the question presented at the prior disciplinary hearings, that is, whether Dr. Yashon should be dismissed from the attending medical staff for disciplinary reasons, differs



from that presented to the Medical Staff Administrative Committee, that is, whether Dr. Yashon should be reappointed, for the year beginning July 1, 1981, to the attending medical staff. See Shulman v. Washington Hospital Center, 319 F.Supp. 252, 254 (D. D.C. 1970).<sup>37</sup> Secondly, as to the charges in Dr. Carey's October 27, 1979 letter to Dr. Cramblett, the record demonstrates that these charges were not fully litigated; a full consideration by the Executive Committee of these charges and of the reprimand by Dr. Tzagournis was precluded by Dr. Yashon's abandonment of his appeal.<sup>38</sup> Finally, some of the charges considered by the Medical Staff Administrative Committee were not the subject of the two prior disciplinary proceedings referred to by Dr. Yashon.



See, e.g., App. B, Attachment III (charges 2(a), 3, 5), though two of these charges (charges 2(a) and 5) were the subject of prior disciplinary not referred to by Dr. Yashon.

This conclusion, that the Medical Staff Administrative Committee was permitted to hear certain charges against Dr. Yashon despite the fact that these charges were the subject of prior disciplinary proceedings, is, the Court believes, in accord with the law of the State of Ohio. In a number of decisions dealing with the principles of res judicata and collateral estoppel, the Ohio Supreme Court has cited with approval the Restatement of the Law, Judgments, Whitehead v. General Telephone Co., 20 Ohio St.2d 108, 112, 114 (1969); Trautwein v. Sorgenfrei, 58 Ohio St.2d 493, 495





(1975); City of Columbus v. Union Cemetery Assn., 45 Ohio St.2d 47, 51 (1976), as well as the tentative drafts of the Restatement of the Law 2d, Judgments. Hicks v. De La Cruz, 52 Ohio St.2d 71, 74 (1977).

Section 131 of the Restatement of the Law 2d, Judgements (Tent. Draft No. 7 [1980]) at 30, provides that

- (1) Except as stated in subsections (2), (3), and (4), a valid and final adjudication by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

Comment a explains that this rule "applies when a final determination by an administrative tribunal is invoked as the basis of claim or issue preclusion in a subsequent action,

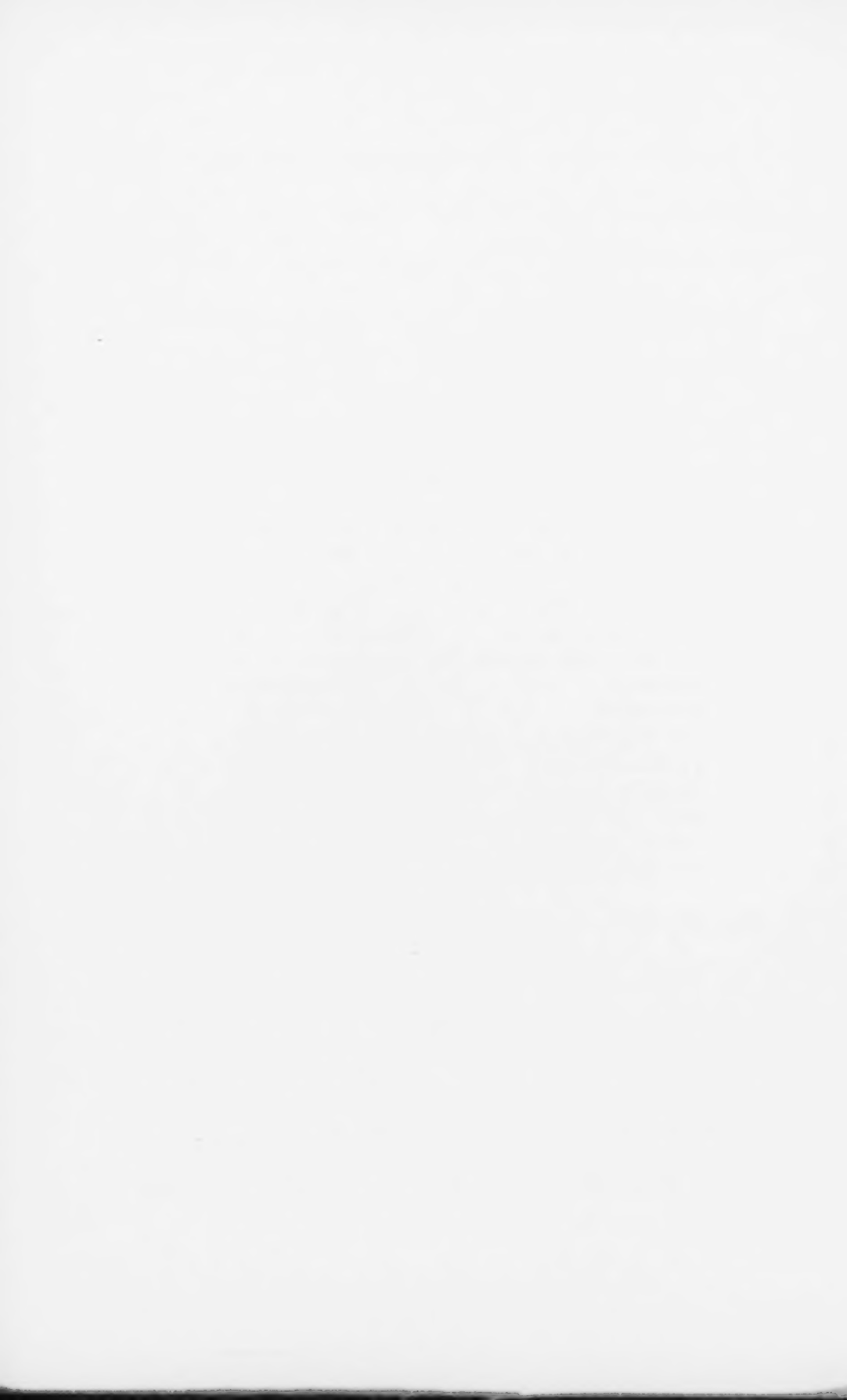


whether that subsequent action is another proceeding in the same administrative tribunal or is a proceeding in some other administrative or judicial tribunal." Id. at 32. And comment b further delineates the situations to which section 131 applies:

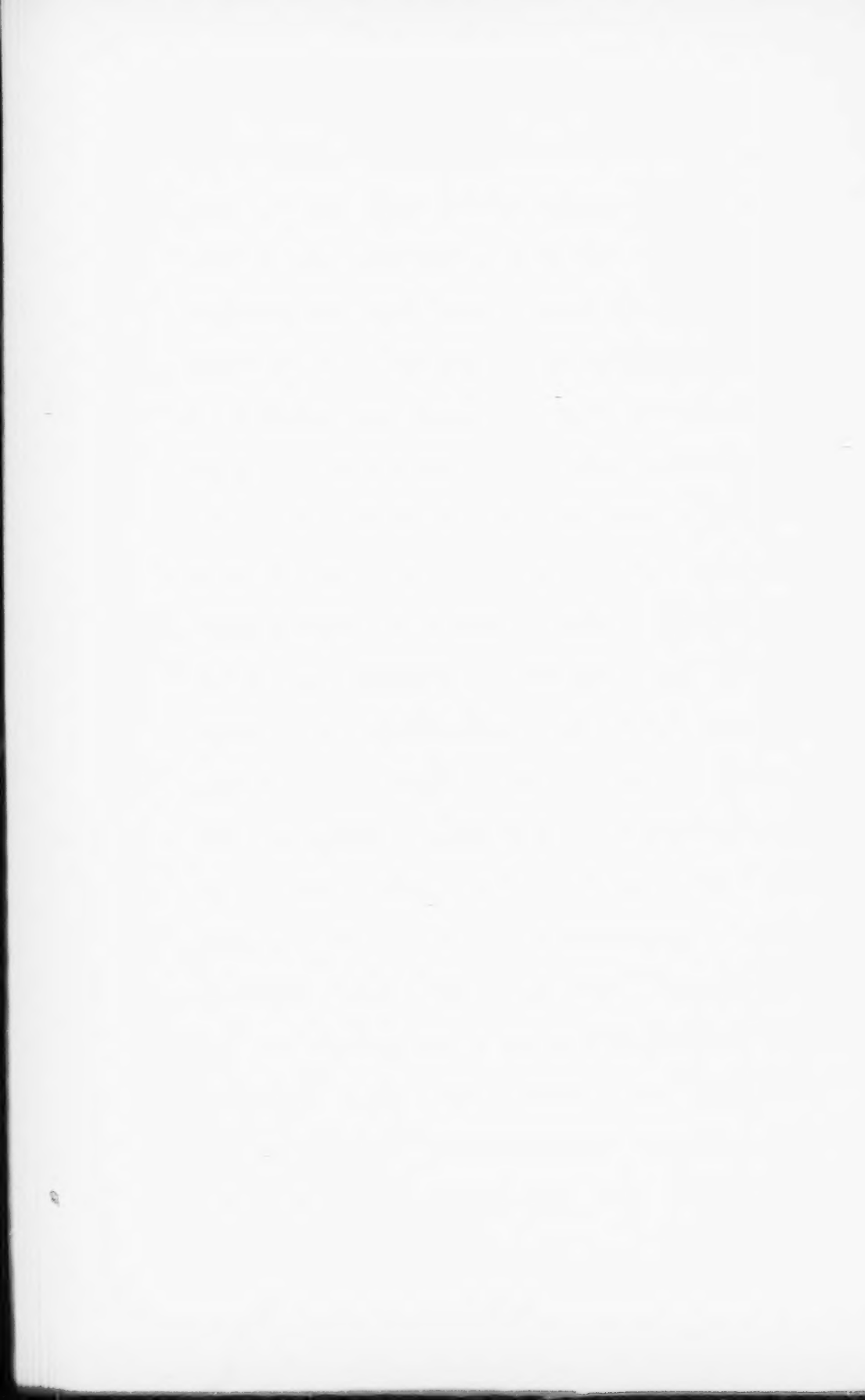
Where an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication. Decisional processes using procedures whose formality approximates those of courts may properly be accorded the conclusiveness that attaches to judicial judgments.

Id. at 33.

Even were the Court to hold that Drs. Tzagournis and Cramblett were acting in adjudicative capacities when they acted on the recommendations of the grievance committee and of the



Executive Committee, respectively, section 131 would still not be of any help to Dr. Yashon. As the Court has previously pointed out, the defendants can rightfully apply different standards to the question of whether a physician's hospital privileges, once granted, should be revoked and the question of whether a physician's application for annual appointment should be denied. Therefore, with respect to the September 1, 1981 hearing of the Medical Staff Administrative Committee, section 131 does not mandate the application of claim preclusion. As to issue preclusion, section 131 may mandate that preclusive effect be given to the findings of fact in the earlier disciplinary proceedings, see comment b, id. at 36; but both the September



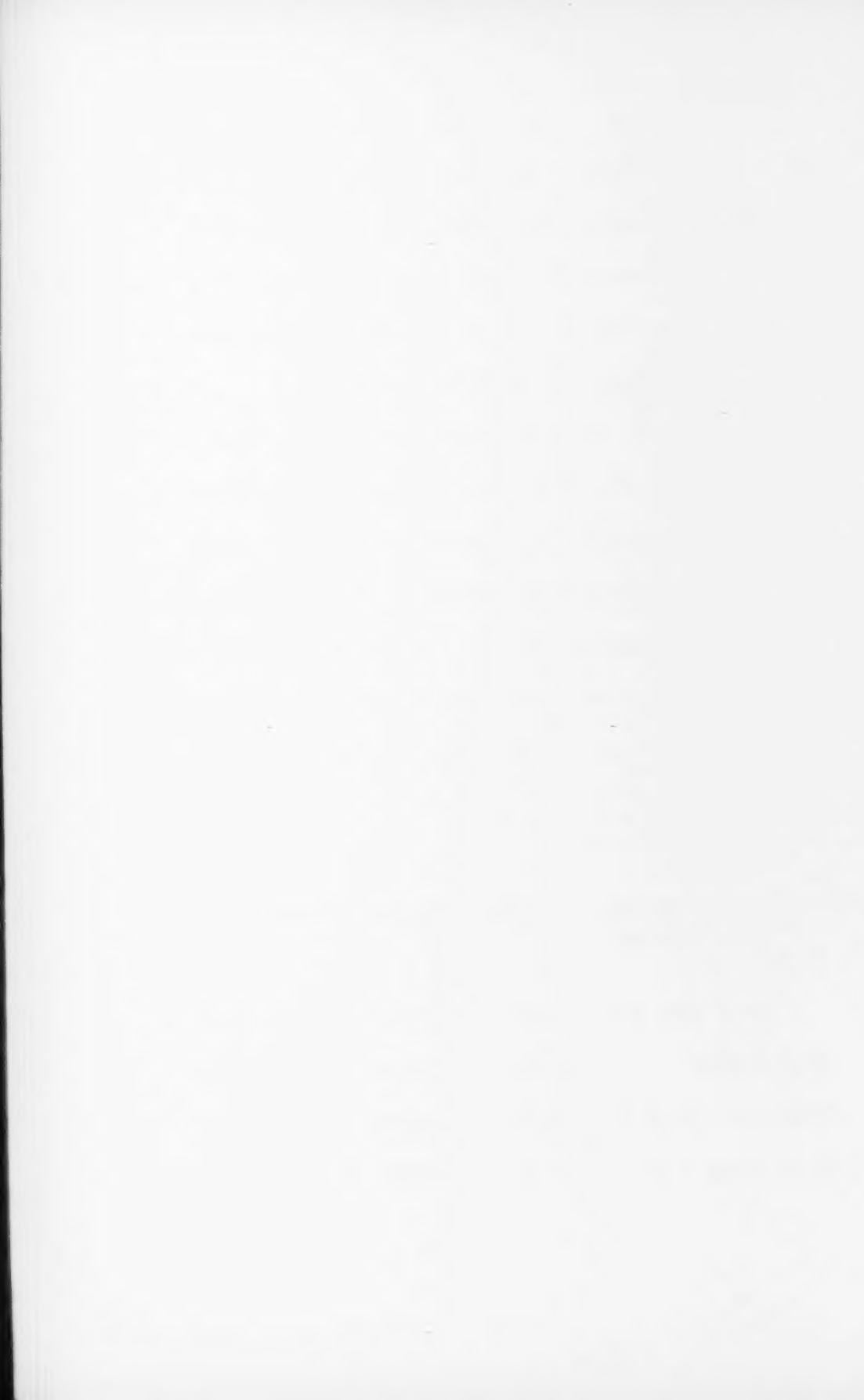
30, 1980 letter of Dr. Tzagournis to Dr. Yashon and the June 26, 1980 letter of Dr. Cramblett fail to include any findings of fact as to which preclusive effect can appropriately be given.

For the above reasons, the Court finds that Dr. Yashon's argument that the principles of res judicata and collateral estoppel barred the Medical Staff Administrative Committee from considering charges evaluated by prior disciplinary proceedings to be without merit.

2. Failure to Comply with the Court's Directives

Dr. Yashon also contends that the September 1, 1981 hearing of the Medical Staff Administrative Committee did not comply with the directives





given by the Court to counsel for the parties on July 17, 1981. Accepting as true the assertions in the Janata Affidavit, it is clear that the Court did not

suggest, indicate or order that the Medical Staff Administrative Committee conduct a "due process" hearing on plaintiff Yashon's application for reappointment to the medical staff, at which hearing witnesses could be called and examined. Instead, [the Court] suggested that plaintiff Yashon and defendant Carey each make a presentation to the Medical Staff Administrative Committee concerning plaintiff Yashon's application for reappointment to the medical staff.

Janata Affidavit at ¶13. It is also clear that the Court did not enter an order precluding Dr. Carey from calling witnesses at the September 1, 1981 hearing.



Even if the Court were of the opinion that the defendants failed to comply with the Court's "suggestions," Dr. Yashon cites no authority for the proposition that this failure, in and of itself, would justify the Court's disregard of the decision of the Medical Staff Administrative Committee. If the procedures employed by the Medical Staff Administrative Committee did not otherwise deprive Dr. Yashon of his constitutional rights,<sup>39</sup> a question the Court has yet to examine, the defendants' failure to comply with the Court's "suggestions" would not render the September 1, 1981 hearing unconstitutional. Cf. United States v. Caceres, 440 U.S. 741 (1979).



### 3. Substantive and Procedural Due Process

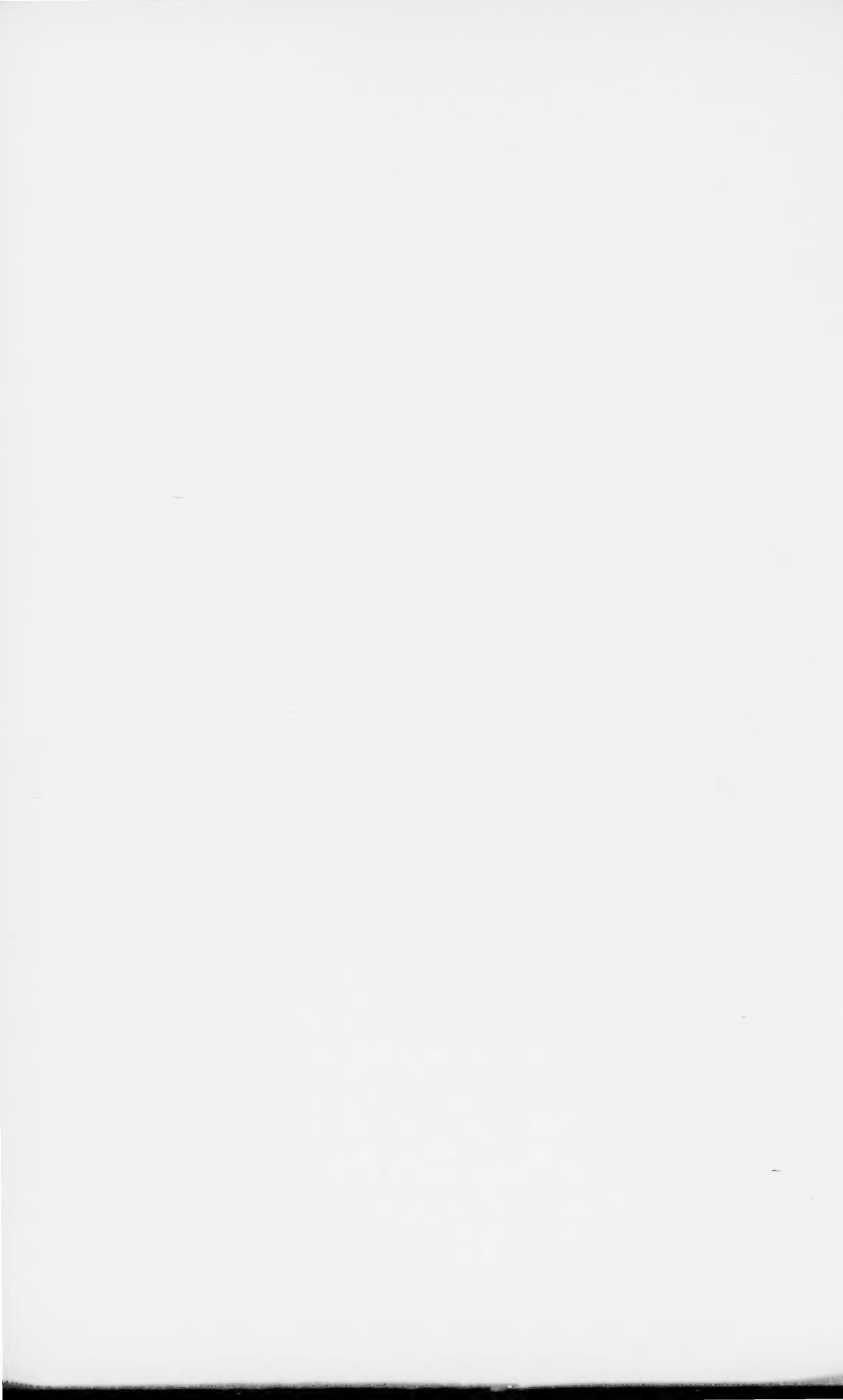
Dr. Yashon has proffered a number of arguments to support his view that the September 1, 1981 hearing of the Medical Staff Administrative Committee did not accord him substantive and procedural due process as required by the Fourteenth Amendment to the Constitution. Assuming that Dr. Yashon did, in fact, have a liberty or property interest pursuant to which the defendants were obliged to comply with the mandates of the Fourteenth Amendment, the Court will first address these arguments.

At the hearing of the Medical Staff Administrative Committee, Dr. Carey explained that he would present testimony and documentary evidence to



support his charges that Dr. Yashon had engaged in conduct that rendered him unfit to be reappointed to the attending medical staff of a teaching hospital. As the Court has previously explained, there was testimony at the hearing as to certain charges (1(e); 2(c); 2(d); 5) which Dr. Yashon either did not deny or as to which Dr. Yashon acknowledged that he had engaged in the conduct but denied that the conduct itself was improper. As to a number of other charges (1(d); 2(a); 3; 9; 13), there was sufficient evidence based upon which the Medical Staff Administrative Committee could find that the charges were meritorious. Finally, there were a number of charges (1(c); 1(f); 8; 14) as to which sufficient evidence was presented to support a finding that the charges were





meritorious; at the same time, the nature of these charges were such that, had Dr. Yashon been given the opportunity, he may have been able to present rebuttal testimony or to lessen the seriousness of the alleged charges.

In determining whether there was sufficient evidence before the Medical Staff Administrative Committee to support the above charges, the Court will not consider the charges de novo and will not "substitute its own judgment for that of the experts who sat in judgment on plaintiff's qualifications to continue to practice surgery." Klinge v. Lutheran Charities Association of St. Louis, 523 F.2d 56, 60 (8th Cir. 1975). As explained by the Eighth Circuit,

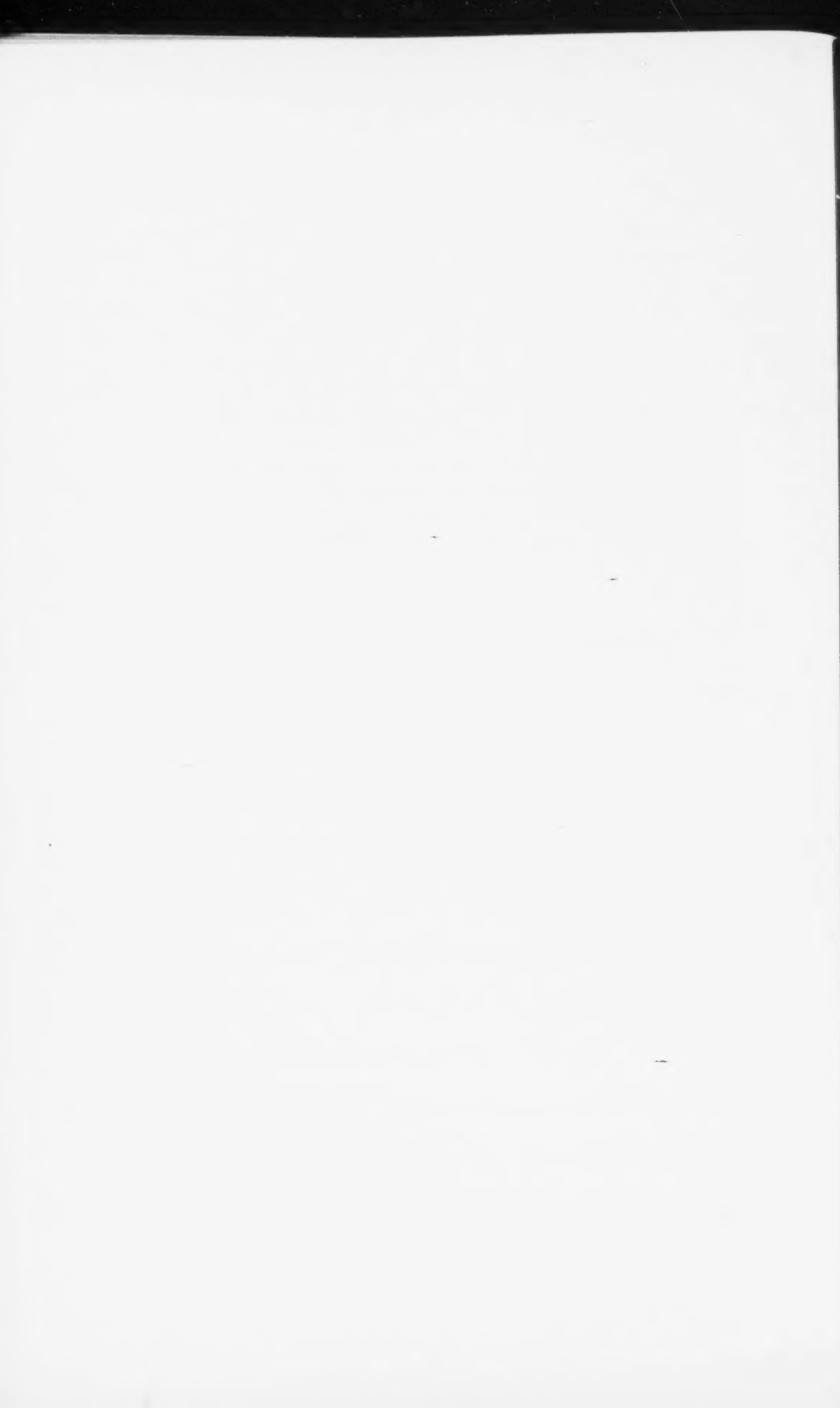
[w]hile plaintiff was entitled to judicial review of the administrative action



that was finally taken against him, he was not entitled to a trial de novo as to his competency to remain on the staff at Lutheran. The judicial inquiry available to him was limited to a consideration of whether his ultimate removal from the staff involved deprivations of procedural or substantive rights guaranteed by the fourteenth amendment.

Id.

Because of this Court's obvious lack of expertise in deciding whether the allegations of misconduct, if proven, rendered Dr. Yashon unfit to be reappointed to the attending medical staff, "the decision of a hospital's governing body concerning the granting of hospital privileges is to be accorded great deference." Laje v. R. E. Thomason General Hospital, 564 F.2d 1159, 1162 (5th Cir. 1977), cert. denied, 437 U.S. 905 (1978). Such a



view is, this Court believes, in accord with the standards articulated by the Fifth Circuit:

. . . No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff

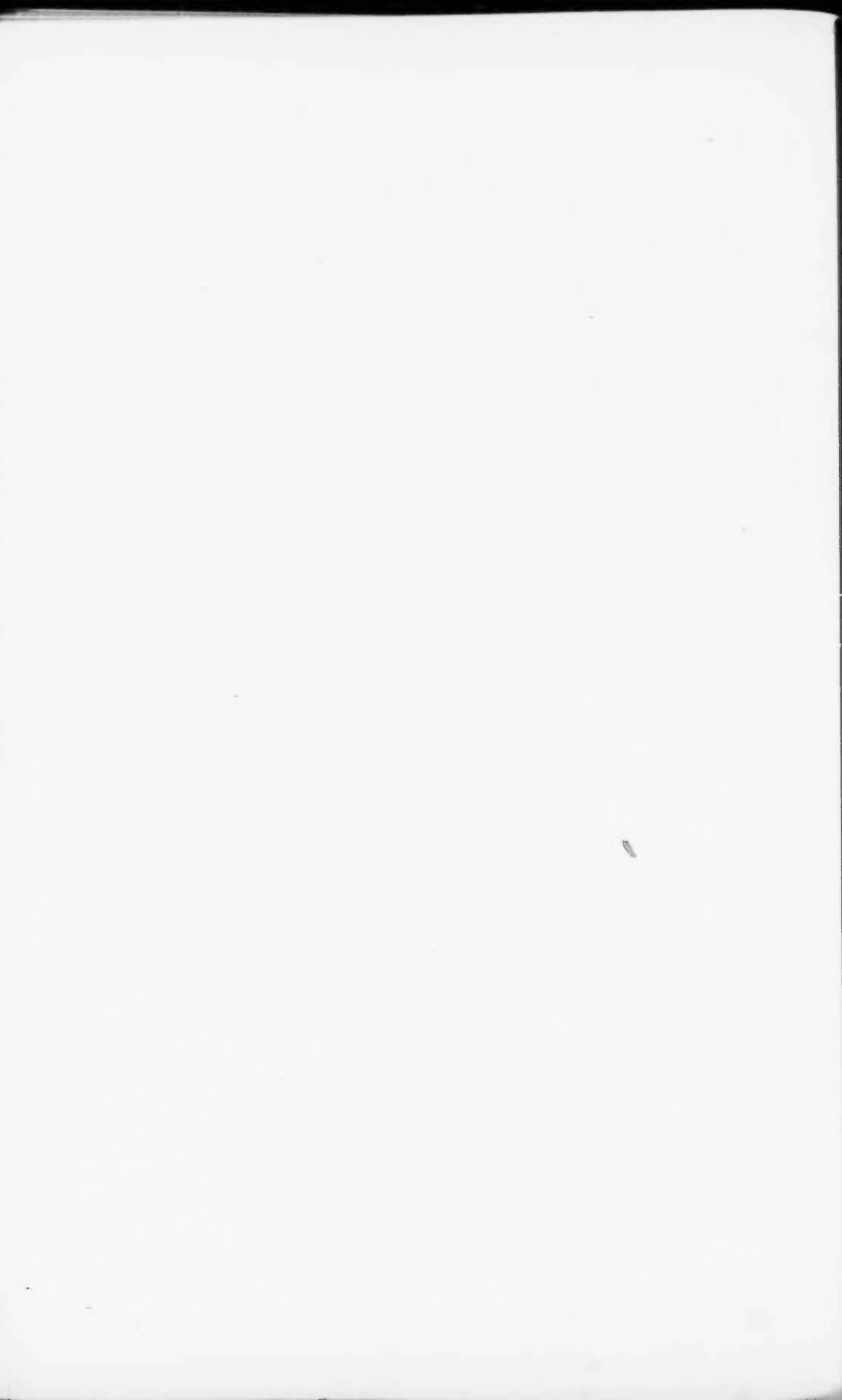


selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the escutcheon of Caduceus.

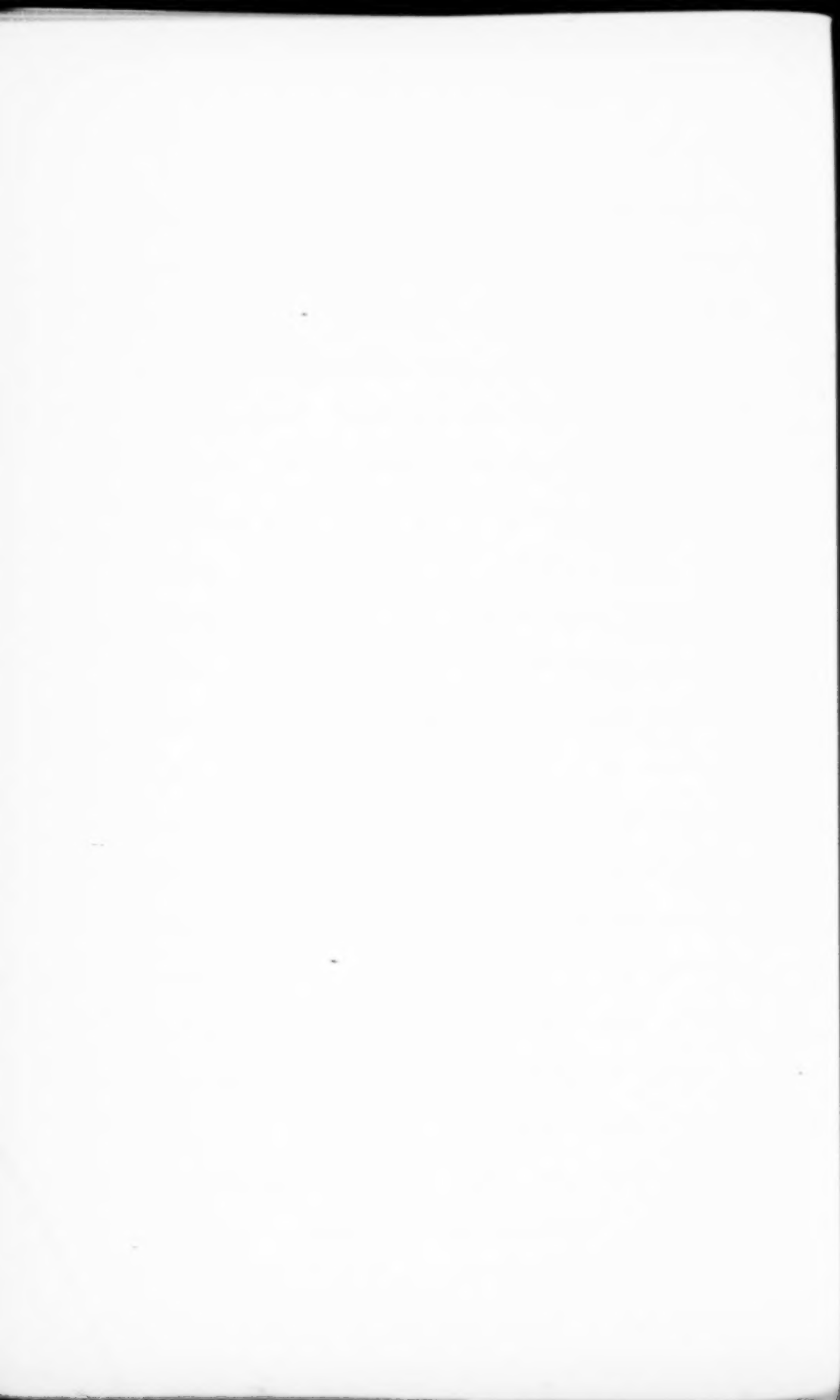
Bona v. Board of Managers of the Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971). Accord, Woodbury v. McKinnon, 447 F.2d 839, 845 (5th Cir. 1971); Klinge v. Lutheran Charities Association of St. Louis, *supra*; Lale v. R. E. Thomason General Hospital, *supra*.<sup>40</sup>

In this case, the Medical Staff Administrative Committee was presented with sufficient evidence that could justify both its finding that certain charges against Dr. Yashon were meritorious and its resultant decision that Dr. Yashon should not be





reappointed to the attending medical staff. Despite the fact that the charges did not include allegations that Dr. Yashon was incompetent as a surgeon,<sup>41</sup> the Court will not second guess the implicit conclusion of the Medical Staff Administrative Committee that the charges, if proven, would render a physician unfit for membership on the medical staff. Further, even though the charges considered did not allege any conduct violative of presently promulgated bylaws of the University Hospitals Board or of any other administrative rules governing the conduct of members of the medical staff, the Court cannot, upon a review of the record, conclude the Medical Staff Administrative Committee, in evaluating the charges of misconduct, applied professional and ethical



standards that were not reasonably related to the operation of the teaching hospital. See Sosa v. Board of Managers of the Val Verde Memorial Hospital, 437 F.2d at 176-77; Klinge v. Lutheran Charities Association of St. Louis, *supra*.

In terms of procedural due process, the defendants maintain that Dr. Yashon "was entitled to reasonable notice of the charges against him and a fair opportunity to be heard with respect to those charges before a panel of fair minded doctors. However, he was not entitled to a full blown judicial trial." Klinge v. Lutheran Charities Association of St. Louis, 523 F.2d at 60, citing Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974), affirming 361 F.Supp. 398 (S.D. W.Va. 1973); Christhilf v. The



Annapolis Emergency Hospital Association, Inc., 496 F.2d 174 (4th Cir. 1974); Woodbury v. McKinnon, supra. Dr. Yashon contends that he was not afforded even these minimal due process protections and that, moreover, because of the drastic consequences of defendants' action in denying his application for reappointment, he was entitled to even greater due process rights.

There is no question but that the notice of the time and place of the hearing to consider Dr. Yashon's application for reappointment to the attending medical staff had to be provided sufficiently in advance to permit him to prepare his defense to the charges. Suckle v. Madison General Hospital, 362 F.Supp. 1196 (W.D. Wis. 1973), aff'd on other grounds, 499 F.2d



1364 (7th Cir. 1974); Christhilf v. The Annapolis Emergency Hospital Association, Inc., supra. Further, the charges to be considered at the hearing must be sufficiently specific as to allow a meaningful opportunity to prepare a defense. Poe v. Charlotte Memorial Hospital, Inc., 374 F.Supp. 1302, 1310 (W.D. N.C. 1974); Suckle v. Madison General Hospital, 362 F.Supp. at 1211-1212. Finally, a number of cases have recognized a physician's right to prehearing discovery. Christhilf v. The Annapolis Emergency Hospital Association, Inc., 496 F.2d at 180; Suckle v. Madison General Hospital, 362 F.Supp. at 1212.

Based on the record before it, the Court finds that Dr. Yashon's constitutional objections as to the adequacy of the notice of the time and



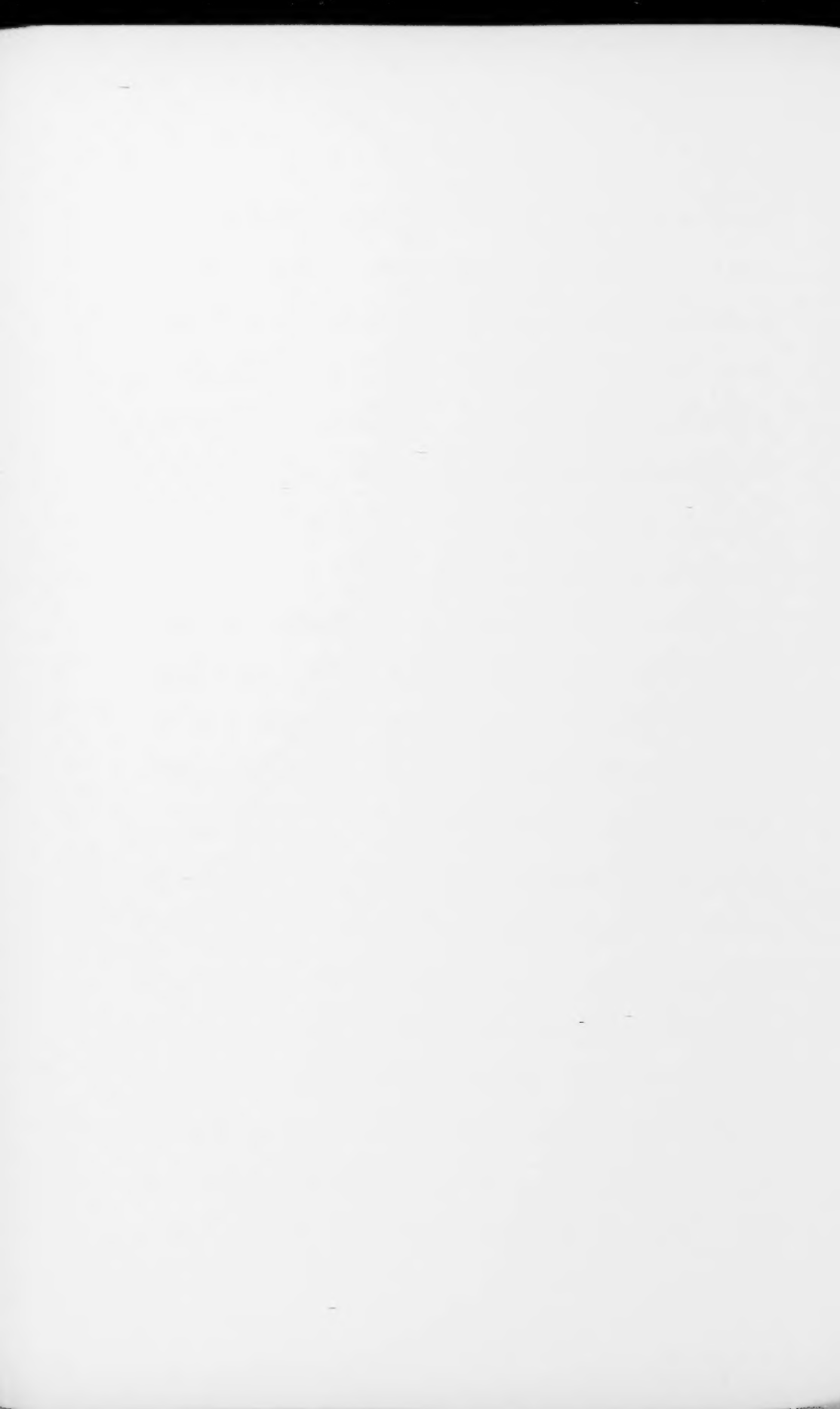


place of the hearing, the specificity of the charges considered by the Medical Staff Administrative Committee, and the failure of the defendants to afford him pre-hearing discovery are without merit. This conclusion rests on a number of factors. Beginning almost three weeks prior to the September 1, 1981 hearing, Dr. Yashon was sent a number of notices concerning the scheduling, format of, and charges to be heard at the hearing before the Medical Staff Administrative Committee. As to the specificity of the charges in Dr. Carey's letter of August 14, 1981 to Dr. Tzagournis, Dr. Yashon himself admits that there are many similarities between these charges and those listed in Dr. Carey's letter of October 27, 1979; Dr. Yashon also expressly admits that most of the



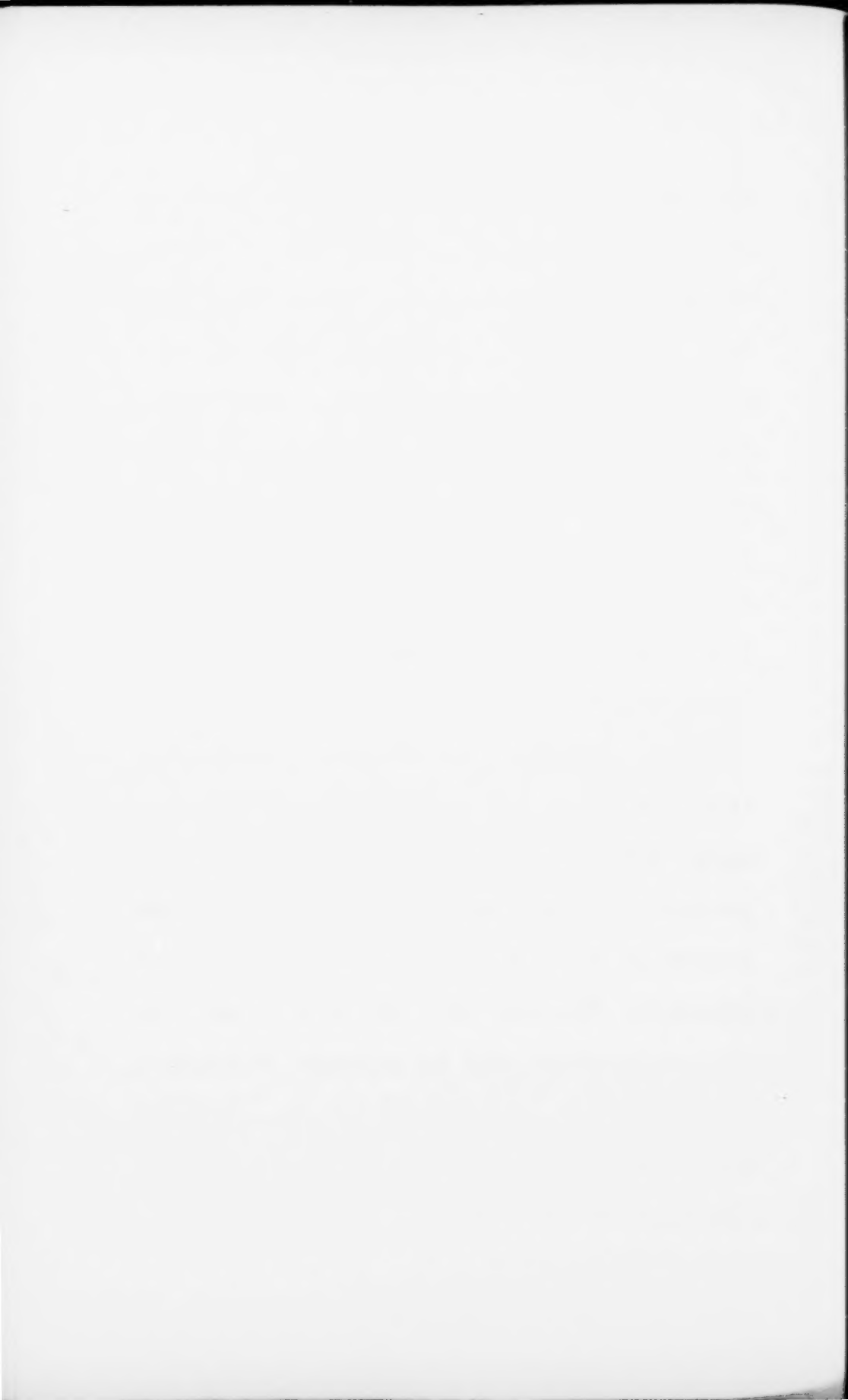
testimony elicited at the September 1, 1981 hearing involved the same incidents that were the subject of the two prior disciplinary proceedings. Plaintiff David Yashon, M.D.'s Memorandum in Opposition to Defendants' Motion to Vacate Consent Order and for Summary Judgment at 14.

The Court has previously noted, moreover, that the charges in the August 14, 1981 letter were very similar to those in Dr. Tzagournis' October 22, 1980 letter to Dr. Yashon and that several of the charges were also the subject of two prior disciplinary proceedings not referred to by Dr. Yashon in his memorandum. In addition, the only documentary evidence presented by Dr. Carey at the September 1, 1981 hearing had been available to Dr. Yashon as part of the scheduled,



but aborted, November 20, 1980 hearing of the Executive Committee. Under these circumstances, Dr. Yashon's prior familiarity with virtually all of the charges and documentary evidence, coupled with his able cross-examination, renders meritless any claim that he was prejudiced by the notice, the content of the charges, or his inability to conduct pre-hearing discovery.<sup>42</sup>

Dr. Yashon maintains, moreover, that the hearing was constitutionally defective in a number of other respects: he was entitled to the presence and active participation of counsel; he was denied the right to call witnesses and to present evidence; and he was entitled to a written decision from the Medical Staff Administrative Committee detailing its



reasons for denying his application for reappointment and describing the evidence it relied upon in reaching its decision.

In Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the Supreme Court delineated the various factors that must be considered in determining what process is due in a particular case:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Despite the fact that two-thirds of Dr. Yashon's medical practice is conducted at another hospital in the City of





Columbus, App. A at 291, the Court fully recognizes that Dr. Yashon has substantial personal interests in being reappointed to the attending medical staff of University Hospitals; these personal interests include maintaining his income, protecting his professional reputation, and maintaining his participation on the medical staff of a teaching hospital. As to the third factor identified in Mathews v. Eldridge, supra, the Ninth Circuit Court of Appeals has eloquently described a hospital's varied and important interests in quickly resolving problems as to medical staff membership:

The Hospital's interest is somewhat more complex. Like any government agency it has a strong interest in being able to deal quickly and inexpensively with personnel matters in order to promote

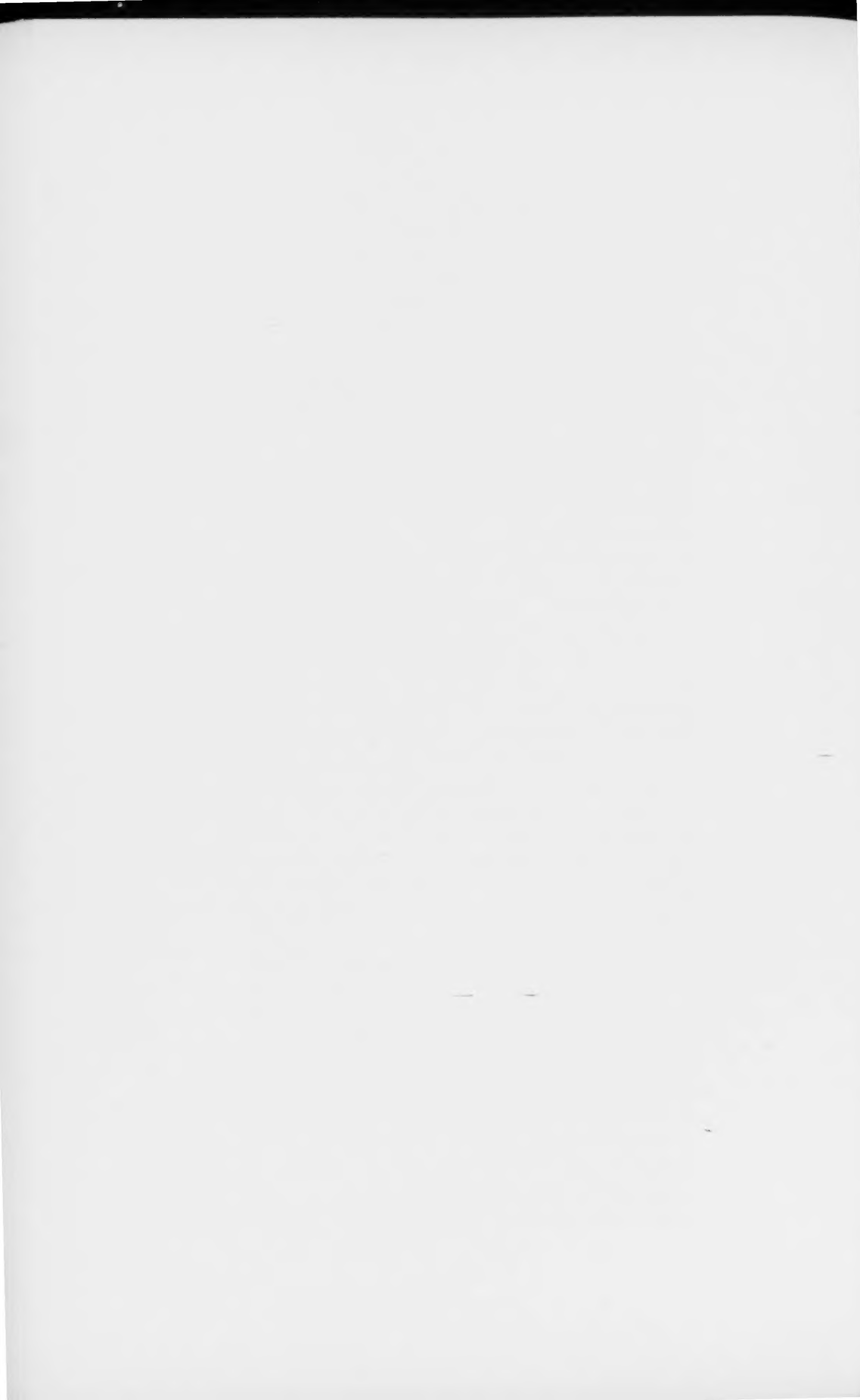


efficiency and economy in administration. But because the government agency here is a hospital and plaintiff Stretten is a professional, the employer's interest is more particularized than in the ordinary case. As a hospital the employer has a special interest in protecting its patients from treatment by one who is professionally incompetent. The survival of patients often depends upon the presence of competent physicians. The interest of the hospital in enlarging the prospects of survival of patients weighs in favor of due process procedures which will minimize the risk of the continued employment of an incompetent doctor, so long as these procedures are consistent with notions of fundamental fairness. In a sense this is the reverse side of the Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), coin. In Goldberg the danger of lack of survival was borne by the plaintiff whose rights were terminated while here the risk is borne by the patients entrusted to the defendant's care.

The Hospital's interest is unusual in another respect.



Dr. Stretten is a professional whose position requires that he work in close coordination with other medical personnel. A hospital staff is highly interdependent, both in the sense that one doctor depends upon the professional skill of other doctors and in the sense that the collegial nature of the body makes tolerable working relationships an absolute prerequisite to effective staff performance. The necessity for a healthy working relationship is a function of the nature of the work to be done. Incompatible workers on farms, ranches, or in certain types of factories can function reasonably well although even there it is doubtful that full efficiency is achieved. Effective performance by physicians on the staff of a hospital, whose tasks require a high degree of cooperation, concentration, creativity, and the constant exercise of professional judgment, requires a greater degree of compatibility. The Hospital must recognize this necessity. This enhances its interest in quickly dealing with incompetence and debilitating personal



frictions. In emphasizing the hospital's and thus the state's interest in harmony, we hasten to assert that we are not drawing the line between professions and nonprofessionals for this purpose. In fact, we believe there is no clear line, rather only a continuum along which the state's interest in expeditious settlement of such problems attenuates.

Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 368 (9th Cir. 1976) [footnote omitted]. Thus, the only task remaining with respect to the three procedural irregularities claimed by Dr. Yashon is to assess "the risk of an erroneous decision prejudicial to plaintiff under the procedures employed and the probable reduction of error which might result from a more elaborate . . . set of procedures." Id.

As to Dr. Yashon's claim that he was entitled to the presence and active



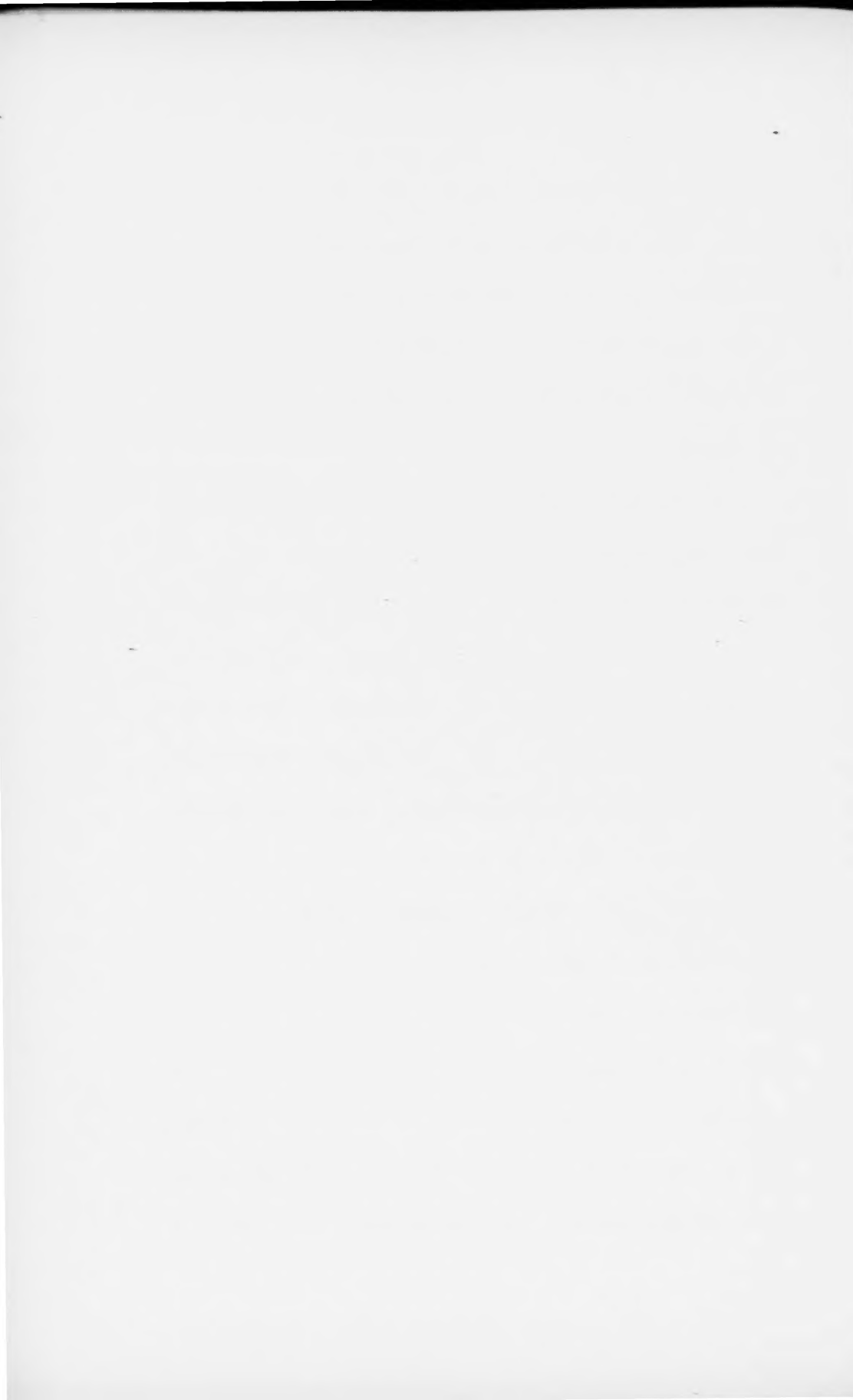


participation of counsel at the September 1, 1981 hearing of the Medical Staff Administrative Committee, the Court cannot say that his desire for the assistance of counsel outweighs the university's interest in avoiding a full fledged trial. Frumkin v. Board of Trustees, Kent State University, 626 F.2d 19 (6th Cir. 1980); Woodbury v. McKinnon, *supra*. But see Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549, 401 A.2d 533, 541-42 (1979); Silver v. Castle Memorial Hospital, 53 Hawaii 475, 497 P.2d 564, 571-72, cert. denied, 409 U.S. 1048 (1972).<sup>43</sup> Where, as here, the record shows that Dr. Yashon fully participated at the hearing, that he was conversant with all of the charges made by Dr. Carey, and that he was competent at cross-examination, the



Court concludes that it is unlikely that the presence and participation of counsel on Dr. Yashon's behalf would have provided a procedure less likely to have resulted in erroneous findings of fact.

Although the courts have recognized the potential importance of counsel in alleviating the risk of erroneous factual determination in criminal trials, see Powell v. Alabama, 287 U.S. 45 (1932), and in welfare benefits pretermination hearings, see Goldberg v. Kelly, 397 U.S. 254 (1970), the hearing in this case was before physicians and involved charges of misconduct by another physician; under these circumstances, the Court will not equate Dr. Yashon's situation with that of a welfare recipient confronted with an administrative hearing or of a



defendant confronted with a criminal trial.

Dr. Yashon's two remaining procedural complaints, however, carry more weight. On the record before the Court, it is clear that Dr. Yashon did not, prior to the hearing of the Medical Staff Administrative Committee, have any notice that Dr. Carey planned to call witnesses; it is also clear that the Medical Staff Administrative Committee considered the evidence and rendered a decision without giving Dr. Yashon an opportunity to call his own witnesses.<sup>44</sup> Some courts have recognized that certain types of hearings involving a physician's appointment to a hospital's medical staff need not provide for the calling of witnesses. E.g., Woodbury v. McKinnon, supra; Christhilf v. The



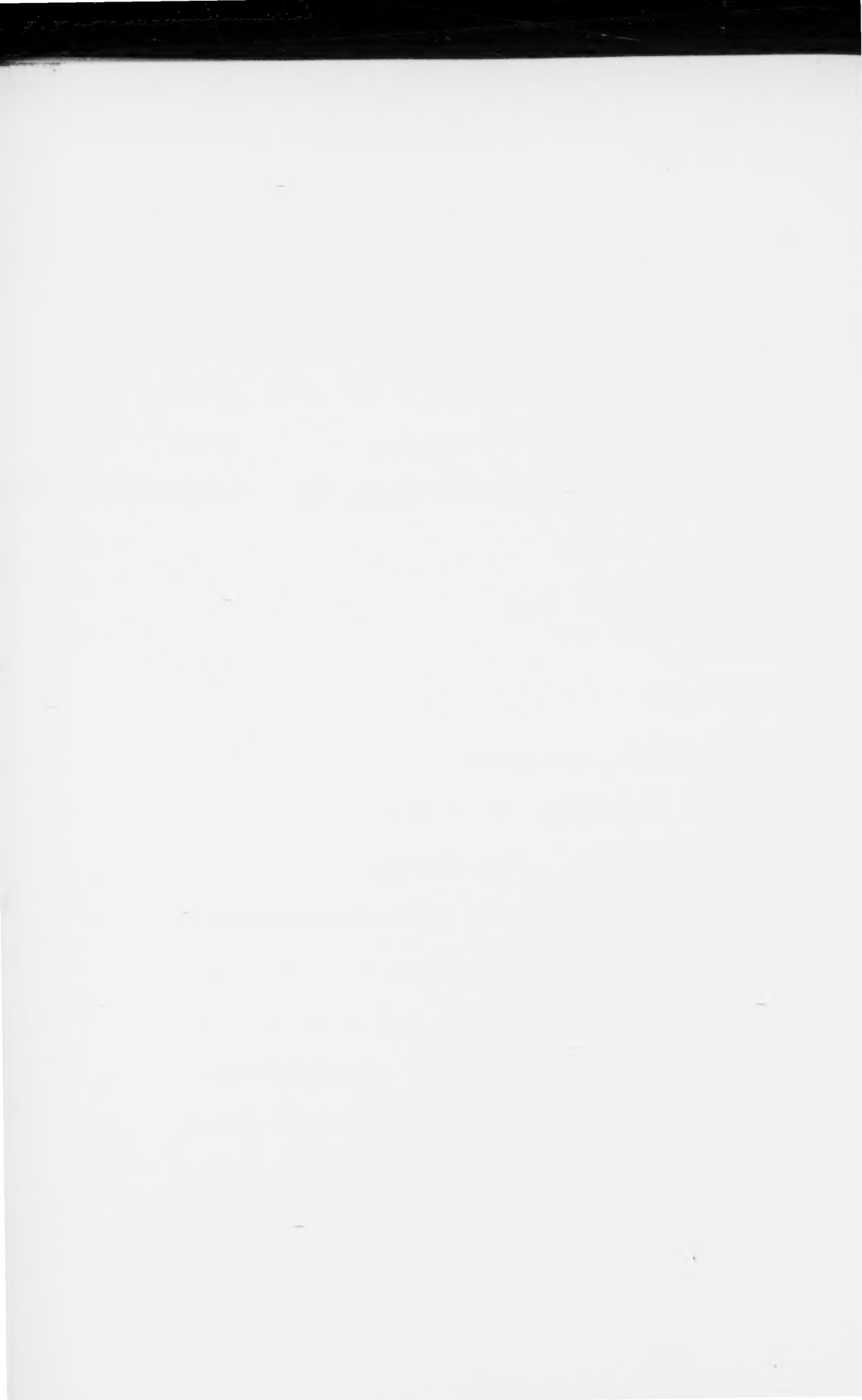
Annapolis                      Emergency                      Hospital  
Association, Inc., 496 F.2d at 179  
n. 2. Other courts have simply held  
that the procedures afforded the  
physician by the hospital complied with  
the due process clause; although the  
hospitals accorded the physician the  
right to call witnesses on his behalf,  
the court's opinions did not hold that  
this was constitutionally mandated.  
E.g., Duffield v. Charleston Area  
Medical Center, Inc., 503 F.2d at 519;  
Hoberman v. Lock Haven Hospital, 377  
F.Supp. 1178, 1188-89 (M.D. Pa. 1974).<sup>45</sup>

Similarly, the law as to whether  
the Medical Staff Administrative  
Committee was required to render a  
written decision specifying the reasons  
for its decision is also less than  
clear. The Supreme Court has, in a  
variety of situations, required that



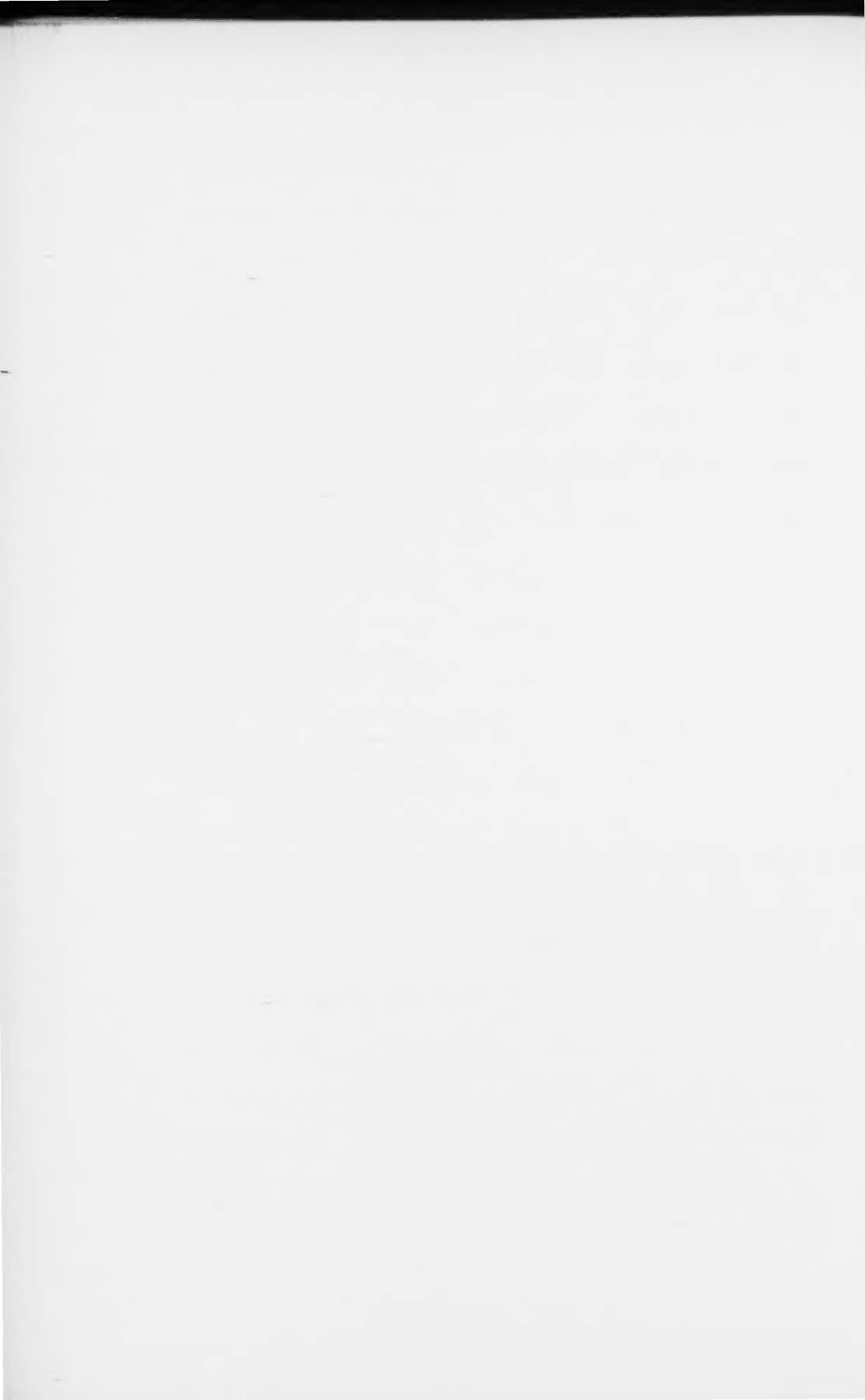


the fact finders render a written statement as to the evidence relied upon and the reasons for the decision. Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Morrissey v. Brewer, 408 U.S. at 487, 489; Wolff v. McDonnell, 418 U.S. 539, 563 (1974). But see, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 15-16 (1979); Connecticut Board of Pardons v. Dumschat, \_\_\_\_ U.S. \_\_\_\_, 49 U.S.L.W. 4711, 4713 and n. 6 (filed June 17, 1981). Cf. Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 85 (1978); Goss v. Lopez, 419 U.S. 565, 581 (1975). In this case, the minutes of the September 1, 1981 hearing reflect only the decision of the committee, that is, that Dr. Yashon should not be reappointed to the attending medical



staff; there is no indication as to which of Dr. Carey's charges was meritorious or of any of the evidence relied upon in finding certain charges meritorious. Though the Court, based upon its independent review of the record, finds that there was sufficient evidence to support certain of the charges, Dr. Yashon is correct in pointing out that the Court must speculate as to whether the Medical Staff Administrative Committee based its decision on the uncontested charges or on charges as to which there was conflicting evidence.

The Court is of the opinion that it would have been preferable that the defendants, having initiated a hearing on Dr. Carey's charges and having permitted Dr. Carey to call witnesses, had allowed Dr. Yashon the opportunity



to call witnesses in defense of the specific charges. Further, the Court's narrow task in assessing whether the decision of the Medical Staff Administrative Committee was reasonably related to the operation of the hospital, Sosa v. Board of Managers of the Val Verde Memorial Hospital, *supra*, would be considerably easier had the committee rendered a decision in which it, at the least, delineated which of the charges were meritorious.

As the Court has previously explained, Mathews v. Eldridge, *supra*, mandated that a number of factors must be balanced in determining what process was due Dr. Yashon. The Court further noted that The Ohio State University has a number of varied and important interests that must be weighed; apart from its interest in being able to deal



expeditiously with personnel matters, the university has very strong interests in ensuring that patients at University Hospitals are not treated by an incompetent physician and in fostering an environment in which physicians are able to work in a cooperative manner with other physicians and hospital personnel. These weighty interests strengthen the university's expectation that it be able to deal quickly with charges that a physician not be reappointed to the attending medical staff because of conduct that renders him professionally unfit; these interests, important as they are, are limited by the requirement that the procedures used in denying an application for reappointment not be fundamentally





unfair. See Stretten v. Wadsworth Veterans Hospital, supra.

In this case, despite the university's weighty interests, the weight of Dr. Yashon's important interest in being reappointed was not ignored. The record is clear that Dr. Yashon was given sufficient notice of the charges that would be considered by the Medical Staff Administrative Committee; that he was totally familiar with the incidents that served as the bases for Dr. Carey's charges; that he was given a full opportunity to respond to the charges; that he was given an opportunity to submit to the committee documentary evidence relevant to any of the charges; and that he was given, and exercised, the opportunity to confront and to cross-examine the witnesses against him. On this record, the Court



cannot conclude that the procedural irregularities raised by Dr. Yashon rendered the hearing and its accompanying procedural protections fundamentally unfair.

This conclusion is, the Court believes, supported by a number of other factors. The Medical Staff Administrative Committee, after considering the charges against Dr. Carey, decided that Dr. Yashon's application for reappointment to the medical staff for one year should be denied. The bylaws of the University Hospitals board make clear that the board has no responsibility over the academic programs at The Ohio State University, including those of the College of Medicine. Accordingly, the Medical Staff Administrative Committee properly limited itself to a



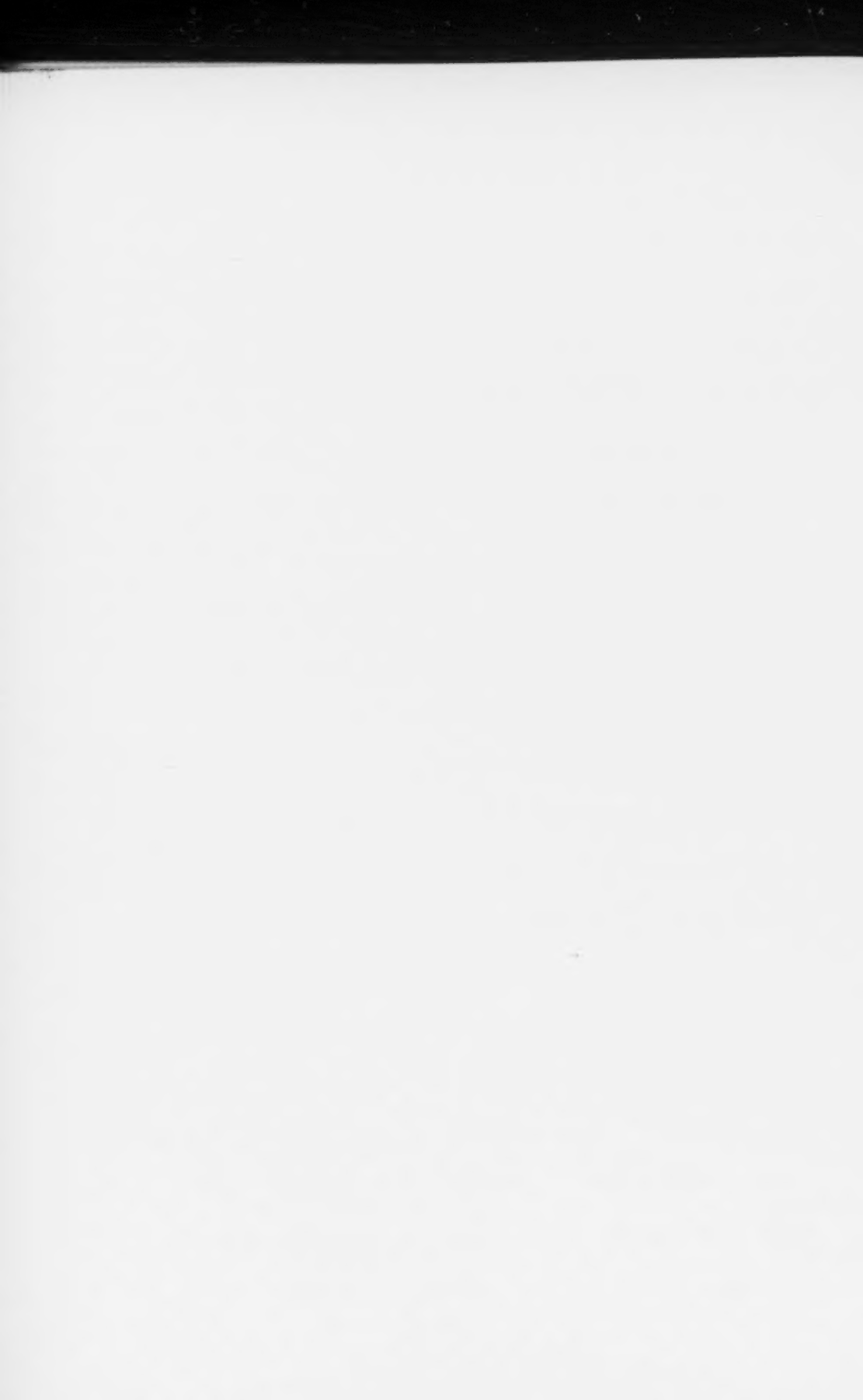
consideration of Dr. Yashon's application for reappointment; the committee did not, nor did it purport to, make any decision or recommendations as to Dr. Yashon's status as a tenured member of the faculty of the College of Medicine. Thus, the question of Dr. Yashon's tenure or the procedures that would be constitutionally required were the university to initiate a detenurization hearing is not before the Court.

Further, looking to the second factor in Mathews v. Eldridge, supra, the Court does not find that the additional procedural protections urged by Dr. Yashon would have, under the facts of this case, reduced the likelihood of possible errors in the findings of fact of the Medical Staff Administrative Committee. Although



given the opportunity to present documentary evidence, Dr. Yashon, while presenting some documents, did not present any that were relevant to Dr. Carey's specific charges. Further, in responding to the charges at the hearing, Dr. Yashon had a full opportunity to explain that there were other hospital personnel who could support his claim that the charges were meritless; yet, as to virtually all of the charges that he contested, Dr. Yashon merely claimed that the witnesses' versions of what had occurred were untrue or that the witnesses were unacquainted with all of the facts. Finally, neither at the hearing nor in his filings with the Court, has Dr. Yashon proffered the name of any witness he would have called had he been given the





opportunity. Under these circumstances, and in view of the Court's extensive review of the administrative record and its determination that there was sufficient evidence to support many of Dr. Carey's charges, a number of which were not even challenged, the Court cannot find that Dr. Yashon was unfairly prejudiced either by his inability to call witnesses or by the committee's failure to render a written decision as to which charges were meritorious.

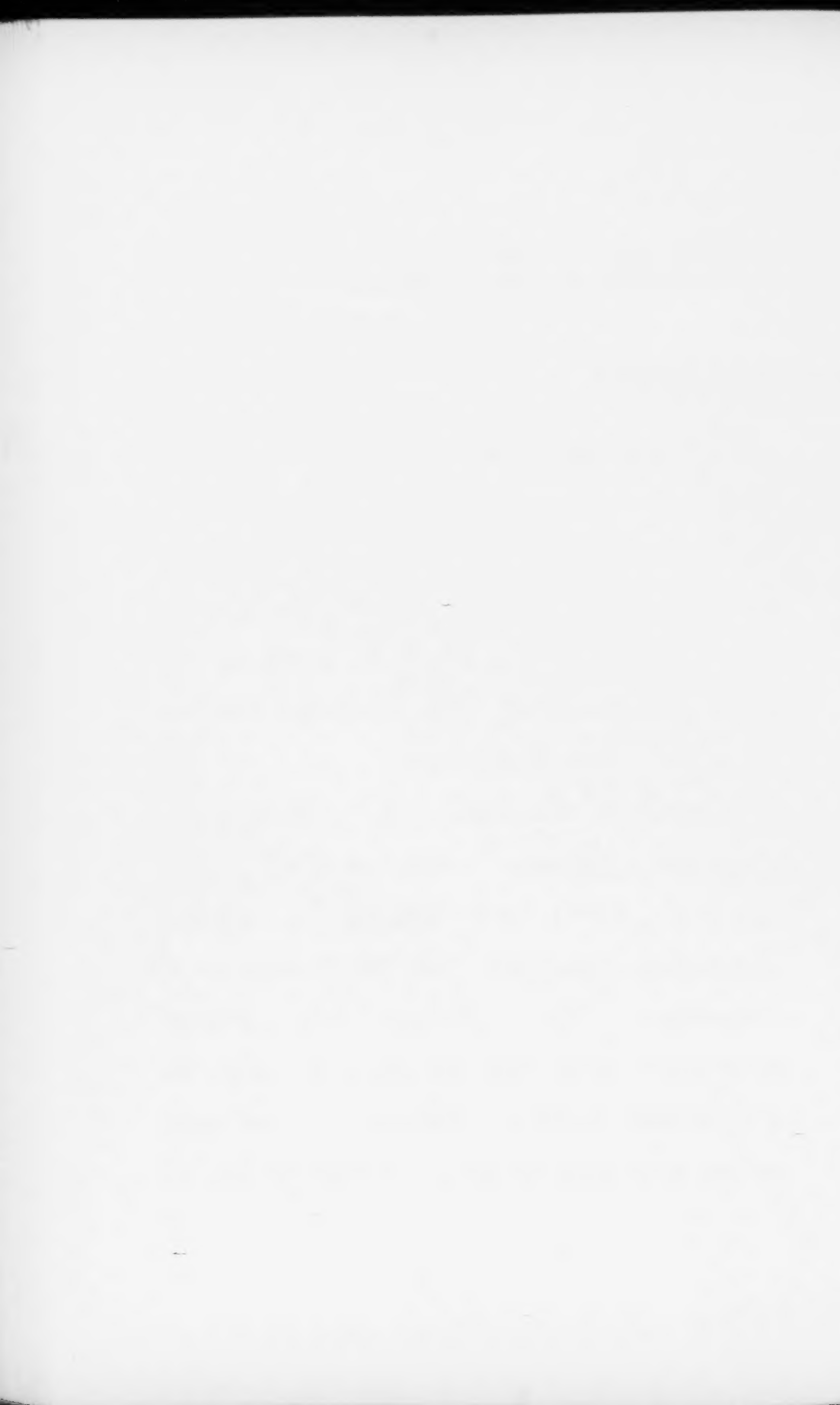
Accordingly, based on the foregoing analysis, the Court concludes that Dr. Yashon's contention that the hearing and decision of the Medical Staff Administrative Committee failed to comply with the dictates of substantive and procedural due process is without merit.



4. Failure to Comply with University  
Hospital Board Bylaws

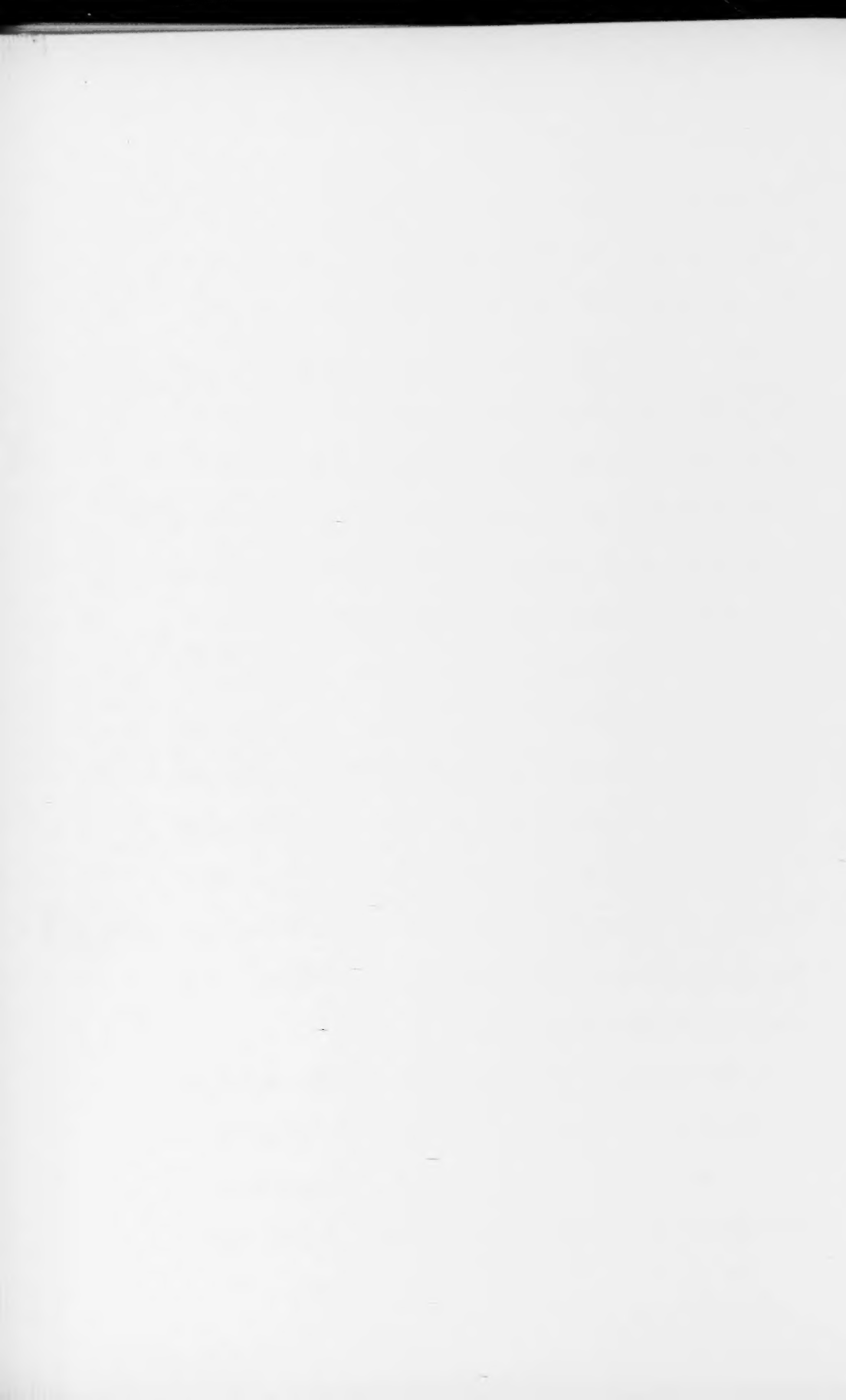
Dr. Yashon next argues that the Court should overrule defendants' motion because the defendants have not complied with the bylaws of the University Hospital Board; to grant the defendants' motion, Dr. Yashon contends, would be to grant finality to the decision of the Medical Staff Administrative Committee.

Citing Schulman v. Washington Hospital Center, 319 F.Supp. 252 (D. D.C. 1970) and Gotsis v. Lorain Community Hospital, 46 Ohio App.2d 8 (Cuyahoga Cty. 1974), Dr. Yashon maintains that the defendants "must at a minimum follow [their] own bylaws, rules and regulations concerning denial



of staff privileges." Plaintiff David Yashon, M.D.'s Memorandum in Opposition to Defendants' Motion to Vacate Consent Order and for Summary Judgment at 23. The University Hospitals Board bylaws provide that the Medical Staff Administrative Committee and the Joint Conference Committee shall make recommendations concerning applications for reappointment to the attending medical staff to the University Hospitals Board, but that the decision as to reappointment shall be made by the board itself. Accordingly, Dr. Yashon contends that the defendants' motion requests relief contrary to their own bylaws.

The complaint in this §1983 action alleged violations of rights guaranteed Dr. Yashon under the Fourteenth Amendment; the complaint alleged



jurisdiction under 28 U.S.C. §§1331 and 1343. The complaint did not, however, allege any pendent state law claims. The Court's duty, therefore, is to determine whether any failure of the defendants to comply with the bylaws of the University Hospitals Board violated Dr. Yashon's constitutional rights.<sup>46</sup>

The Sixth Circuit Court of Appeals has ruled in a variety of contexts that not every disregard of its regulations by a state administrative agency amounts to a violation of federal constitutional rights:

Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions.

Bates v. Sponberg, 547 F.2d 325 (6th





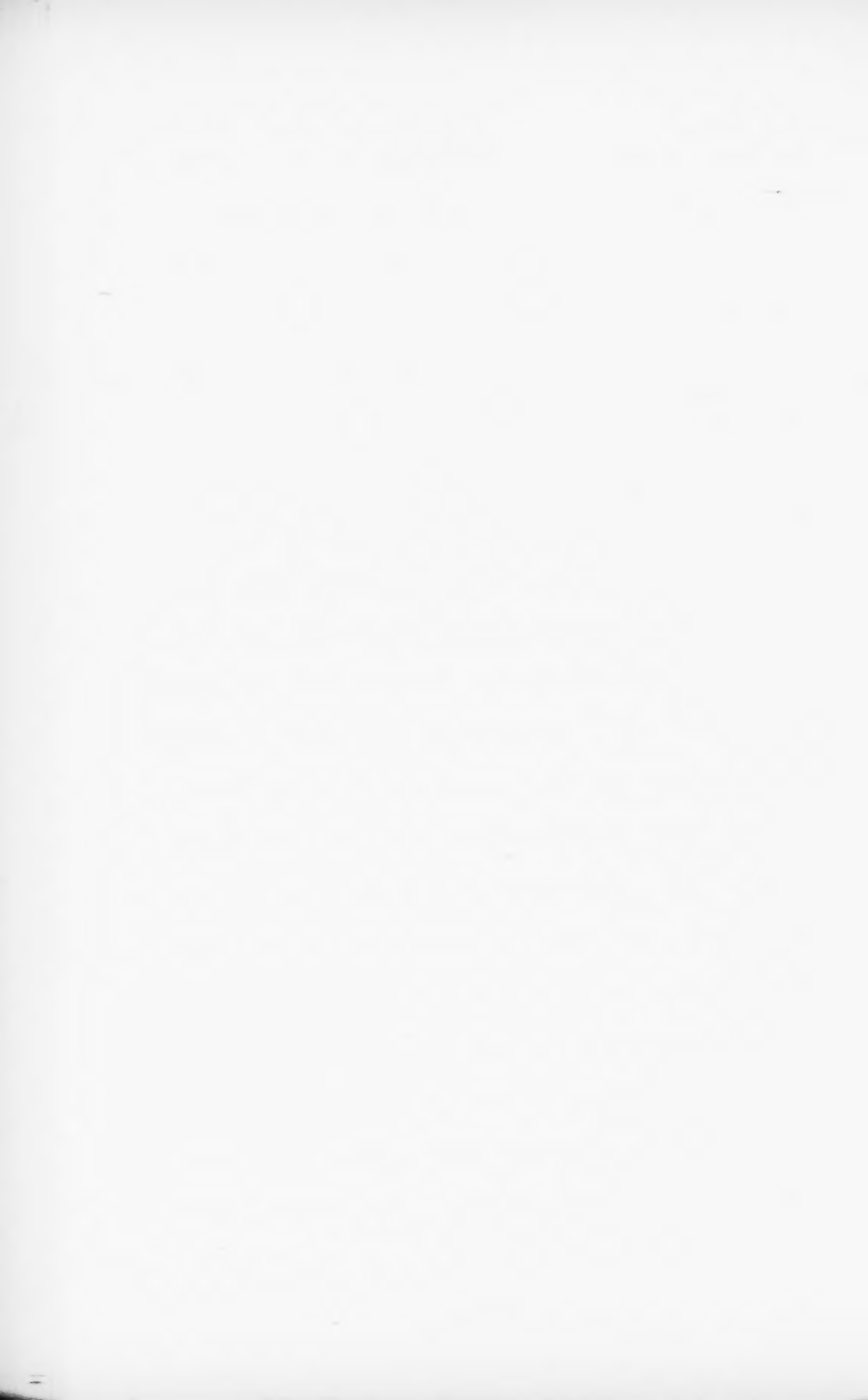
Cir. 1976). Accord, Bills v. Henderson, 631 F.2d 1287, 1298 (6th Cir. 1980). This conclusion is fully consistent with recent Supreme Court opinions. United States v. Caceres, supra; Board of Curators of the University of Missouri v. Horowitz, 435 U.S. at 92, n. 8. Cf. Cofone v. Manson, 594 F.2d 934 (2d Cir. 1979); Lombardo v. Meachum, supra.

Where, as here, Dr. Yashon has failed to establish that the defendants deprived him of a liberty or property interest in violation of the due process clause, the Court cannot conclude that the defendants' failure to comply with the reappointment procedures in the University Hospitals' bylaws deprived Dr. Yashon of any due process rights. Accordingly, the defendants' failure to comply with the



bylaws does not, standing alone, pose an impediment to granting defendants' motion to vacate the consent order and for summary judgment.

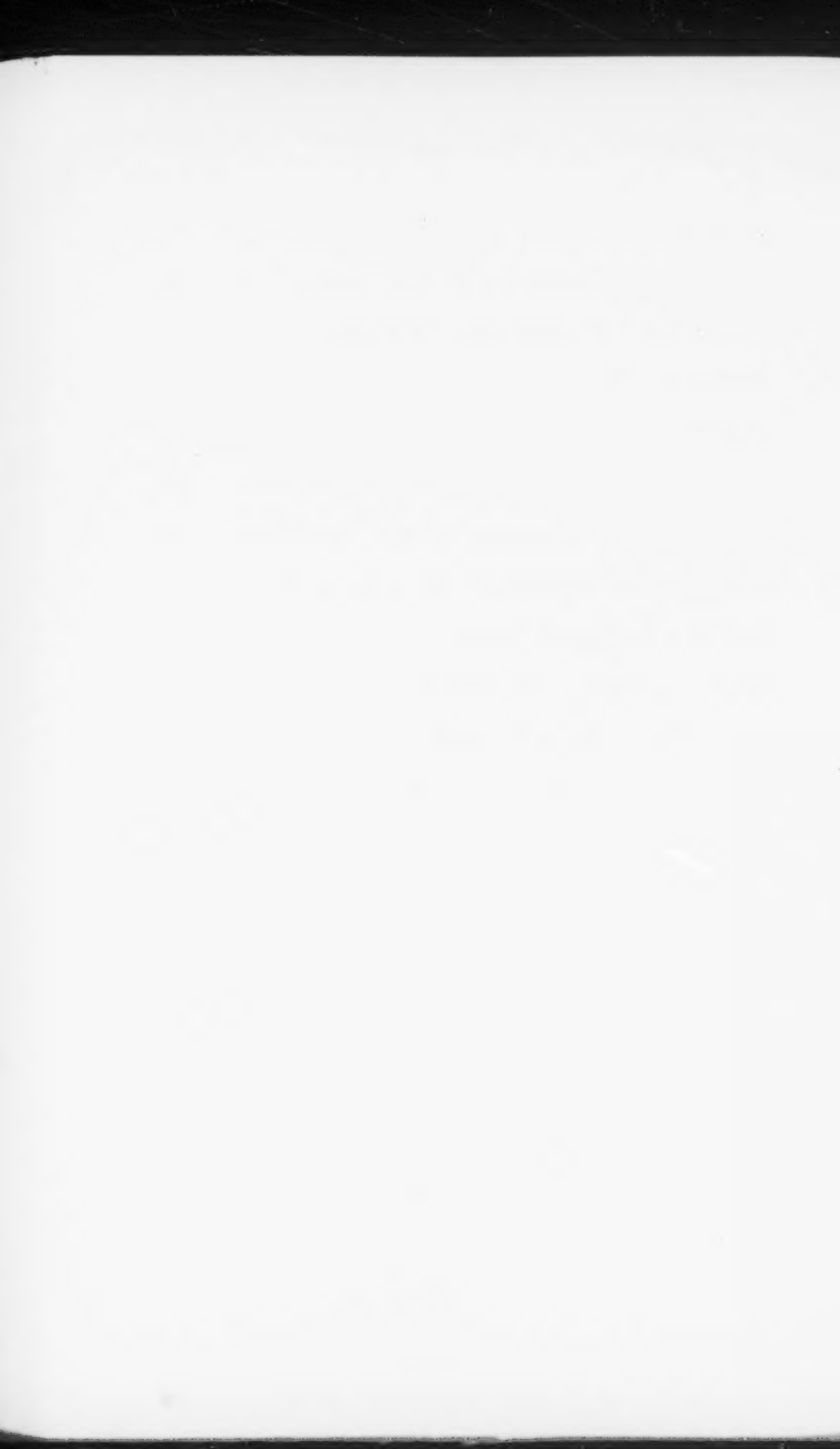
At a number of places in the complaint, see e.g., ¶¶46, 48, 50, Dr. Yashon raises a similar point; he urges that the defendants can only deny his application for reappointment to the attending medical staff pursuant to the procedures governing corrective action against a physician which are delineated in the constitution, bylaws, rules and regulations of the medical staff of University Hospitals<sup>47</sup> or pursuant to the procedures governing discipline of tenured faculty members which are delineated in the rules of the university faculty. The above analysis is equally applicable to these contentions as well. In that the



question of what due process is due is a federal question, the Court is not bound by procedures defined in state administrative rules when it considers whether the process afforded Dr. Yashon was constitutionally sufficient. In that the hearing and accompanying procedures utilized by defendants were fully constitutional, the Court finds that the defendants were not constitutionally required to comply with the disciplinary procedures in the rules of the university faculty or in the constitution, bylaws, rules and regulations of the medical staff.

#### 5. The Appropriateness of Summary Judgment

Finally, Dr. Yashon argues that summary judgment is inappropriate



because there are disputes as to material facts. —

Fed. R. Civ. P. 56(c) provides, in relevant part, that

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions — on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In any civil litigation the standard for granting summary judgment under the above rule is strict. It is settled that

on a motion for summary judgment the movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion. Adickes v. Kress & Co., 398

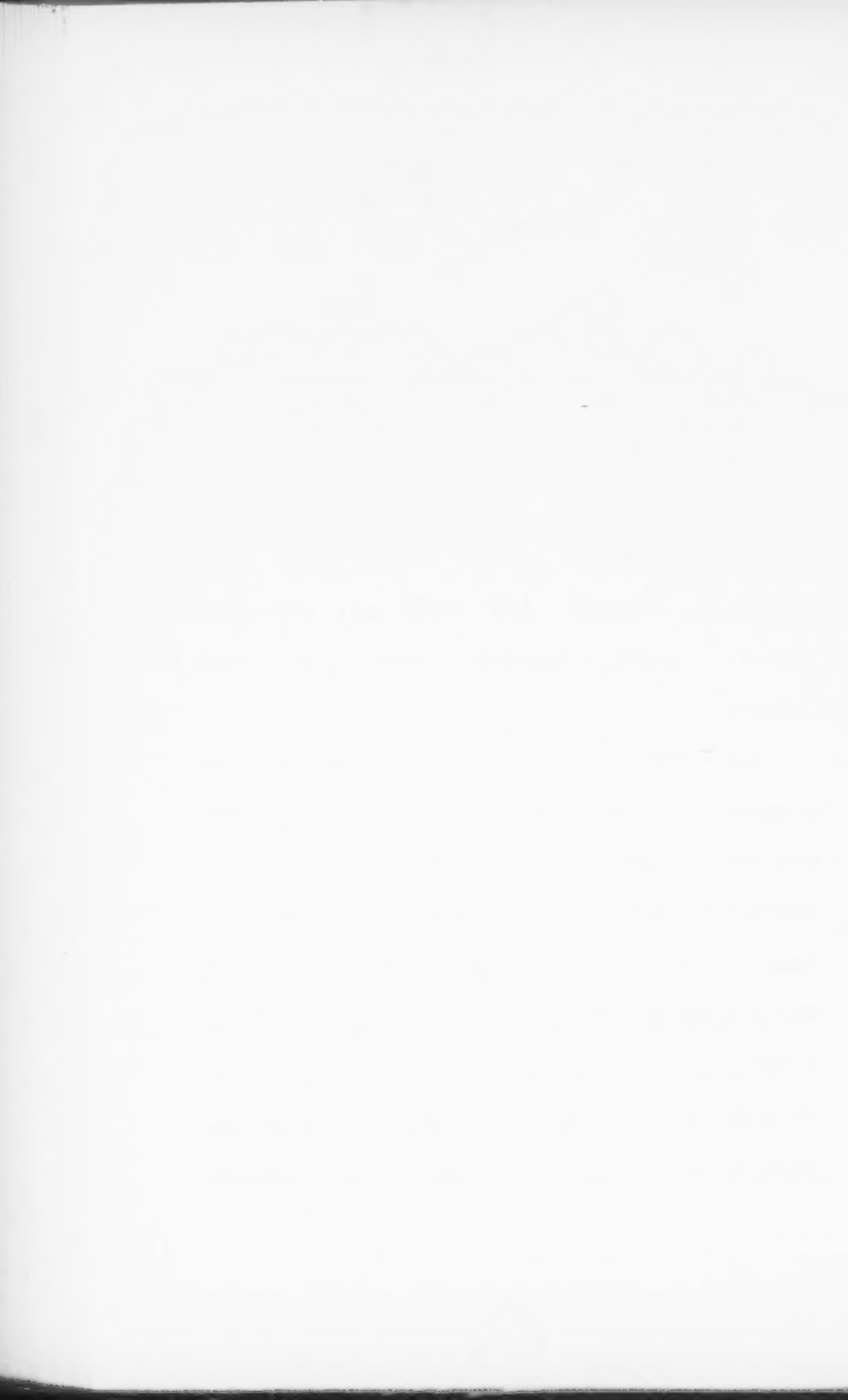




U.S. 144, 157, 158-59, 90  
S.Ct. 1598, 26 L.Ed.2d 142  
(1970); United States v.  
Diebold, 369 U.S. 654, 655  
(1962) (per curiam); United  
States v. Articles of Device,  
etc., 527 F.2d 1008, 1011  
(6th Cir. 1976). . . .  
[W]hile the movant's papers  
are to be closely  
scrutinized, those of the  
opponent are to be viewed  
indulgentlly. Bohn Aluminum &  
Brass Corp. v. Storm King  
Corp., 303 F.2d 425, 427 (6th  
Cir. 1962).

Smith v. Hudson, 600 F.2d 60, 63 (6th  
Cir.), cert. denied, 444 U.S. 986  
(1979).

In this case, the only relief  
sought by Dr. Yashon is injunctive  
relief compelling defendants to  
reinstate him to the attending medical  
staff of University Hospitals and  
restraining defendants from further  
attempts to dismiss him from the  
attending medical staff without  
complying with the procedures



delineated in the rules of the university faculty and the constitution, bylaws, rules and regulations of the medical staff.

The Court has previously found that the defendants did not violate the due process clause in denying Dr. Yashon's application for reappointment to the attending medical staff; that is, the procedures employed by the Medical Staff Administrative Committee in considering his annual application for reappointment complied with the dictates of the Fourteenth Amendment. Further, the Court has ruled that, as a matter of federal constitutional law, the defendants were not required to follow the disciplinary procedures outlined in either the rules of the university faculty or in the constitution, bylaws, rules and



regulations of the medical staff. Under these circumstances, the Court finds that the disputed facts deferred to in the memorandum contra the defendants' motion are not material to a resolution of the only issue before the Court, namely, Dr. Yashon's reinstatement to the attending medical staff of University Hospitals. See, e.g., Woodbury v. McKinnon, supra; Klinge v. Lutheran Charities Association of St. Louis, supra; Kaplan v. Carney, 404 F.Supp. 161 (E.D. Mo. 1975).

D.

WHEREUPON, the Court determines that the defendants' motion to vacate the consent order and for summary



judgment is meritorious and it is  
GRANTED.

The Court ORDERS that the consent  
order of July 17, 1981, insofar as it  
provided that Dr. Yashon would be  
granted the same rights and privileges  
as a member of the medical staff of  
University Hospitals as he had had as  
of June 30, 1981, be and is hereby  
VACATED.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary  
United States District  
Judge





### FOOTNOTES

- 1 According to Dr. Yashon, the terms of the contract include the letter of offer, the annual notices of appointment, the relevant statutes of the State of Ohio, the bylaws of the Board of Trustees of The Ohio State University, the rules of the university faculty, the departmental and/or college statement of criteria and procedures for promotion and tenure, the faculty handbook, the operating manual, and any written understandings between Dr. Yashon and the university regarding his employment. Pursuant to this contract, Dr. Yashon had been awarded tenure. (Complaint, ¶¶6 - 7.)
- 2 The complaint also prays for injunctive relief.
- 3 The text of the May 10, 1979 agreement is reprinted in Appendix C at 10, appended as an exhibit to Defendants' Motion to Vacate the Consent Order and for Summary Judgment in David Yashon, M.D., et al v. William E. Hunt, M.D., et al, C-2-81-867.
- 4 The amended memorandum of Dr. Hunt detailed the circumstances under which resident assistance would be afforded Dr. Yashon.



- 5 The complaint also prays for injunctive relief.
- 6 The allegations relevant to this motion are fully detailed in the Court's discussion of a third suit filed by Dr. Yashon. Infra at Section A.3. of this opinion.
- 7 Attached to Dr. Carey's motion to dismiss the motion of Dr. Yashon for a preliminary injunction was the affidavit of Dr. Manuel Tzagournis, Dean of the College of Medicine. Dr. Tzagournis stated that the Medical Staff Administrative Committee of University Hospitals, at its June 10, 1981 meeting, and the Executive Committee of University Hospitals, at its June 17, 1981 meeting, had both declined to approve Dr. Yashon's application for reappointment. Dr. Tzagournis further stated that he twice advised Dr. Yashon of these decisions and of his opportunity for appeal and/or a hearing before the Medical Staff Administrative Committee, but that Dr. Yashon had not notified him of any wish to have a hearing convened. See Exhibits A-1 and A-2, attached to Dr. Tzagournis' affidavit.
- 8 The trustee defendants include: Chester Devenow; Leonard J. Immke; Warren J. Smith; Daniel M. Galbreath; John F. Havens; John D. Jacobs, D.D.S.; John W. Berry; and D. James Hilliker.



- 9 The University Hospital Board defendants include: Dean W. Jeffers; Charles Y. Lazarus; Dr. Lloyd M. Parks; John W. Wolfe; John Hodges; Frank Lomax; Dr. Frieda M. Shirk; The Honorable Robert M. Duncan; Arthur I. Vorys, Esq.; Josephine S. Frailer; Dr. Morris A. Rosenblum; Edmund C. Redman; and D. James Hilliker.
- 10 The Joint Conference Committee defendants include: Dean W. Jeffers; Dr. Frieda M. Shirk; Dr. Lloyd M. Parks; Arthur I. Vorys, Esq.; Daniel M. Galbreath; Donald A. Cramp; Manuel Tzagournis, M.D.; M. Jan Dickson; Earl N. Metz, M.D.; Ronald B. Berggren, M.D.; and Arthur D. James.
- 11 The Medical Staff Administrative Committee defendants include: Manuel Tzagournis, M.D.; Earl N. Metz, M.D.; Ronald B. Berggren, M.D.; John S. McDonald, M.D.; Tennyson Williams, M.D.; Calvin M. Kunin, M.D.; Frederick P. Zuspan, M.D.; William H. Havener, M.D.; William H. Saunders, M.D.; Donald A. Senhauser, M.D.; Grant Morrow III, M.D.; Martin D. Keller, M.D.; Ernest W. Johnson, M.D.; Ian W. Gregory, M.D.; Atis K. Freimanis, M.D.; William R. Wallace; Arthur D. James; Donald A. Cramp; and Dr. Carey.



12 According to plaintiffs,

[t]he defendant Board [of Trustees of The Ohio State University] and all other defendants are joined herein pursuant to the specific objection of defendant Larry C. Carey [in C-2-81-411] that they are necessary parties to this action and that failure to join them as defendants would deprive the Court of the ability to award full and complete relief on the claims presented herein.

Complaint, ¶13.

13 Dr. Yashon contends that the application for reappointment to the attending medical staff

was routinely requested of each and every physician member of the faculty of the College of Medicine each year. As to those staff members who had been routinely and automatically reappointed to the Attending Medical Staff for a number of years, like plaintiffs, and particularly as to those staff members whose competence, fitness and character as medical practitioners had long since been established and approved by the University in granting them tenure, like plaintiff in Yashon, the submission of





these applications by plaintiffs was in 1981, as it had been in previous years, a formality incident to the orderly process of annual reappointment.

Complaint, ¶29.

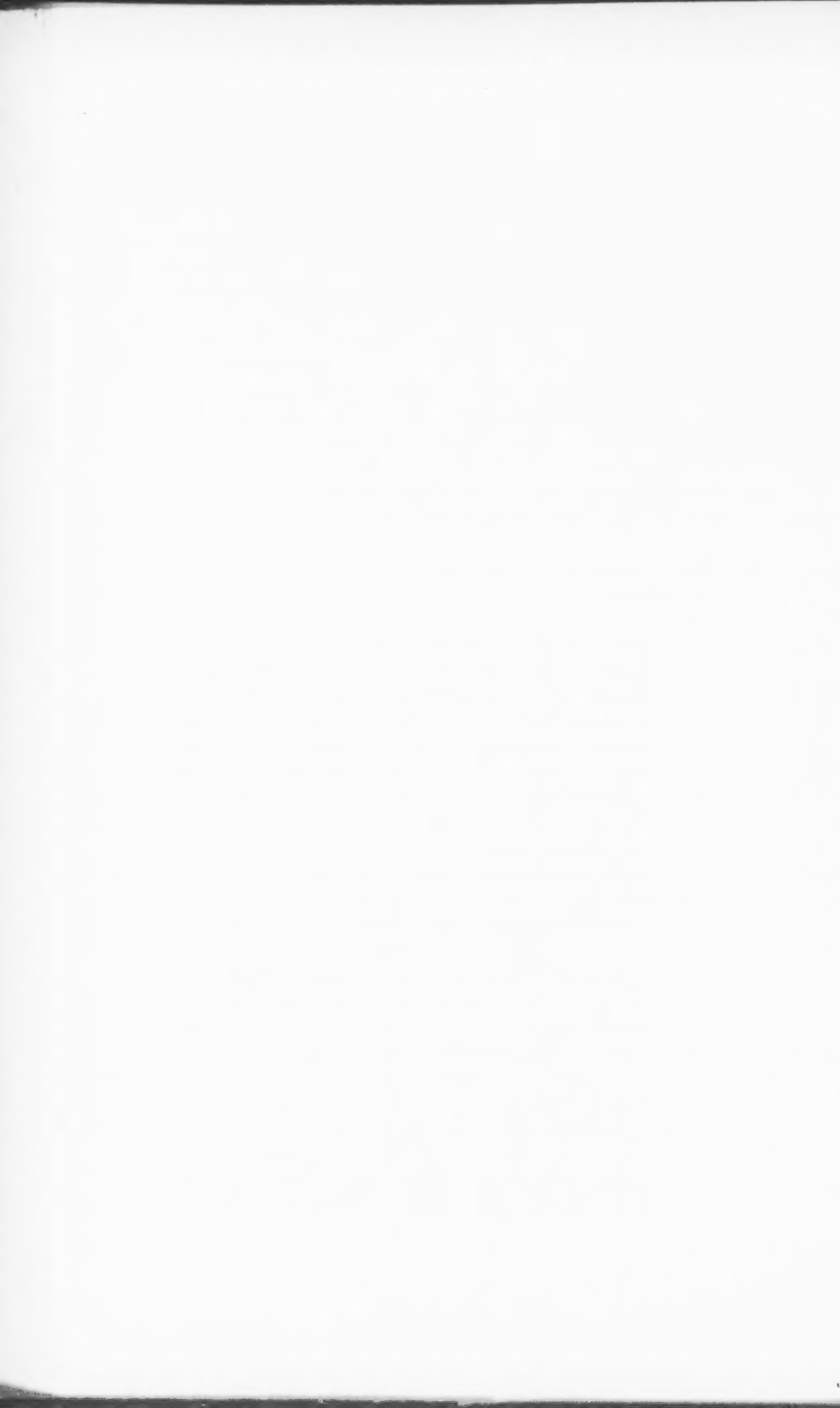
- 14 Dr. Tzagournis is the present Dean of the College of Medicine.
- 15 For a fuller discussion of these previous attempts, see Section B.3. of this opinion and order.
- 16 This claim is listed as the fifth claim in the verified complaint; the fourth claim deals with plaintiff Hawk's claim for relief and is not before the Court.
- 17 The allegedly unconstitutional features are delineated in paragraphs 55 - 62 of the verified complaint.
- 18 The plaintiffs have not, to date, filed a motion for a preliminary injunction; Dr. Yashon now urges that the motion for a temporary restraining order be treated as a motion for a preliminary injunction. - Plaintiff David Yashon, M.D.'s Memorandum in Opposition to Defendants' Motion to Vacate Consent Order and for Summary Judgment at 44.
- 19 Appended to defendants' motion to vacate the consent order and for



summary judgment were the following documents: Appendix A, a two volume transcript of the September 1, 1981 proceedings of the Medical Staff Administrative Committee [hereinafter App. A]; Appendix B, a September 3, 1981 letter of Dr. Whitcomb with attachments [hereinafter App. B], and Appendix C, a compilation of the documents submitted by Dr. Carey to the Medical Staff Administrative Committee at its September 1, 1981 meeting [hereinafter App. C].

- 20 The letter from Dr. Whitcomb stated in part:

At the last Medical Staff Administrative Committee meeting, September 1, 1981 was selected as the date to hear your request for reappointment to the Medical Staff. As Chairman of the committee, I have the responsibility for determining the format to be used during your hearing. Dr. Carey has written to Dr. Tzagournis stating his reasons for not recommending your reappointment to the Medical Staff (a copy of the letter is enclosed for your information). At the hearing, I will ask Dr. Carey to elaborate on the allegations contained in his letter. You in turn, will have the opportunity to respond fully to each of the issues raised



by Dr. Carey. Following the presentations by Dr. Carey and yourself, the Committee will meet to deliberate and vote on your request for reappointment.

- 21 At the hearing, Dr. Whitcomb amplified on the adequacy, from his perspective, of the notice afforded Dr. Yashon:

I would just simply say that by personal conversation with me, I informed him [Dr. Yashon] approximately five or six weeks ago that this hearing would take place and, because of the history and the accumulation of so much data, it was the opinion of the lawyers that consistent with other due process hearings of other medical staff, there did not need to be very specific information written out in detailed form in a letter to be provided to him. We were in no way attempting to do anything that would be unfair, and we specifically were not to create a situation in which, on the one hand, we present a great deal of information here and a great deal of information there. We were simply to hear why did Dr. Carey make his recommendation [.] That was all. The purpose of the meeting is what was Dr. Carey's reasoning.



App. A at 363-64.

- 22 Documentary evidence relevant to many of these charges was, however, available to members of the Medical Staff Administrative Committee. See Appendix C.
- 23 While the Court does not rule out the possibility that Dr. Yashon may have been able to find witnesses to support his denial of some of these charges, the Court notes that Dr. Yashon, either at the hearing or in his filings with the Court, has not proffered the name of any witness he would have called had he been afforded the opportunity. In addition, the record of the hearing demonstrates that most of the testimony was such that the committee members would have to decide whether Dr. Yashon's or the witness' recollection of what occurred was more trustworthy. This is especially true as to those charges as to which it appears there were no other available witnesses. See, e.g., App. A at 87-88, 161-67, 176-80, 185-91, 277-80 re. charge 1(d); App. A at 101-06, 111-14, 116-35, 147-48 re. charge 2(a); App. A at 237-41 re. charge 9; and App. A at 282-84, 333 re. charge 13.
- 24 Although Dr. Yashon was not told, prior to the hearing, the names of the persons Dr. Carey planned to call as witnesses nor the substance of the testimony they would present





in support of his reasons for declining to recommend Dr. Yashon's reappointment, the record in the three Yashon cases demonstrates that Dr. Yashon was aware of virtually all of the charges as to which testimony was proffered. Most, if not all, of the charges were referred to in the previous disciplinary actions that had been initiated against Dr. Yashon. See App. A at 121-23; App. C at 1, 2, 3(B), 3(C), 3(C)(1)(d), (j), (k), (q), (v), and (w), 3(C)(3), 3(C)(4), 3(C)(6), 4, 5, 6, 7, 8, and 9; Exhibits 23, 24, and 25, appended to Dr. Yashon's affidavit in support of his motion for a preliminary injunction in Yashon II.

- 25 Section 3335-5-03 of the Ohio Administrative Code provides that tenure may be lost by formal resignation, by retirement, or by reason of proved incompetence or grave misconduct in accordance with section 3335-5-04. According to section 3335-5-04(A)(7), "[c]omplaints alleging grave misconduct shall refer only to activities that, if proved, seriously impair a faculty member's effectiveness in meeting his defined teaching, service, and research obligations." Where, as here, the complaint against a tenured faculty member alleges grave misconduct, the dean of the college must dismiss the complaint if no reasonable and adequate grounds were found to support the



complaint; the dean's decision to dismiss the complaint is appealable to the provost. Section 3335-5-04(C)(2)(a).

- 26 It is not clear from the record whether this dismissal was appealed to the provost.
- 27 Dr. Keith was referring to the constitution, bylaws, rules and regulations of the medical staff of University Hospitals that were in effect prior to May 2, 1980. At the present time, no such governing rules are in effect. See Janata Affidavit at ¶9, App. A at 374-75.
- 28 The concern evidenced by Dr. Tzagournis as to what evidence was considered and what witnesses were heard by the grievance committee was reflected by various members of the Medical Staff Administrative Committee at the September 1, 1981 hearing. App. A at 154-57, 228-29, 272. Of those who testified at the September 1, 1981 hearing, it is clear that at least Drs. McGaharan, Hill, Miller and Goodman were not interviewed by the grievance committee. App. A at 205, 228, 272, 286. It is also clear that two other residents who were critical of Dr. Yashon, Drs. Steven Natelson and Richard Dewey, were not interviewed by the grievance committee. App. A at 154-57.
- 29 For reasons not apparent from the record, the hearing date of



November 2, 1980, see App. C at 9, was changed to November 23, 1980. The Court notes that Appendix C, which was provided to the Medical Staff Administrative Committee, had been originally compiled for the November 23, 1980 meeting of the Executive Committee.

- 30 The events relating to the Brumfield incident formed the basis for charge 1(d) in Dr. Carey's August 14, 1981 letter to Dr. Tzagournis.
- 31 Neither of the parties has provided the Court with a copy of the written report of the Executive Committee.
- 32 The other charge considered by this committee involved a matter as to which no testimonial evidence was presented at the September 1, 1981 hearing of the Medical Staff Administrative Committee.
- 33 The precise function of the Board of Trustees in terms of appointments to the medical staff is unclear. See Section 3335-101-05 of the Ohio Administrative Code: the University Hospitals Board may appoint physicians and dentists to the medical staff "subject to the ratification of the Ohio state university board of trustees."
- 34 Section 3335-97-03(A)(3) of the Ohio Administrative Code provides



that the Joint Conference Committee "shall make recommendations to the [University Hospitals] board on all applications for appointment or reappointment to the medical staff of the hospitals, . . . ." Section 3335-101-06(A) provides that the Medical Staff Administrative Committee "shall . . . make recommendations regarding medical staff status and privileges to the [University Hospitals] board."

35 Section 3335-101-04 provides:

The medical staff organization shall recommend to the board medical staff bylaws, rules, and regulations that set forth the medical staff organization and the governance process for maintaining such bylaws, rules, and regulations to accomplish the purposes set forth in rule 3335-101-03 of the Administrative Code. When such bylaws, rules, and regulations are adopted by the board and the Ohio state university board of trustees, they shall become effective and become part of the bylaws, rules, and regulations of the hospitals. The medical staff organization shall also be responsible for reviewing these bylaws, rules, and regulations periodically and recommending appropriate revisions to the board.





Pursuant to section 3335-101-05, the bylaws would have to include qualifications for membership on the attending medical staff as well as procedures governing the reappointment of physicians to the medical staff.

- 36 Prior to May 2, 1980, appointments to the attending medical staff and the discipline of medical staff members were governed by articles IV, V, and VI of the constitution and bylaws of the medical staff of The Ohio State University Hospitals. See Janata Affidavit ¶9 and attachments. Article IV had likewise provided that appointments to the medical staff would be for one year. In addition, Article IV had required that an application for appointment be submitted to the director of University Hospitals, who would then transmit the application to the chief of the appropriate clinical division. The final decision was to be made by the dean of the College of Medicine. Under the bylaws of the University Hospitals Board, the board itself makes the decisions on applications for appointments to the medical staff; the present bylaws do not direct to whom an application for appointment or reappointment is to be forwarded, though this matter will undoubtedly be resolved by the yet to be approved medical staff bylaws.

- 37 The Court is of the opinion that



this distinction between revocation of privileges of a member of the attending medical staff and annual reappointment to the attending medical staff is not without meaning. While any particular incident or incidents of misconduct may not be considered of such magnitude as to justify the removal of a physician during the course of his annual appointment, such incident or incidents, when considered with other allegations of misconduct, may justify a hospital's decision to decline to reappoint a physician when his one year appointment to the attending medical staff expires. Accordingly, the Court agrees with the defendants that the principles of res judicata and collateral estoppel did not bar the members of the Medical Staff Administrative Committee from considering, in the context of reviewing Dr. Yashon's annual application for reappointment, the charges considered at prior disciplinary hearings; as the defendants point out, "it is imperative that the Administrative Committee, because of its responsibilities to the hospital and to the public, consider all of the incidents touching on Dr. Yashon's qualifications to serve on the staff of a teaching institution." Defendants' Reply Memorandum in Support of Motion to Vacate Consent Order and for Summary Judgment at 9.



- 38 In his October 22, 1980 letter to Dr. Yashon, Dr. Tzagournis made clear that the Executive Committee could confirm, modify, or reject his decision to issue a reprimand; Dr. Tzagournis also listed fifteen specific charges that would be considered by the Executive Committee. Dr. Tzagournis' view that the Executive Committee was empowered to conduct a de novo review of the charges against Dr. Yashon and to recommend confirmation, modification, or rejection of the decision to issue a reprimand was in accord with the then existing constitution and bylaws of the medical staff of University Hospitals. See Article VI §§3(B), 4(I), attached as an exhibit to the Janata Affidavit. As defendants correctly point out, the Executive Committee, had it heard Dr. Yashon's appeal, may have chosen to recommend Dr. Yashon's dismissal from the attending medical staff in lieu of a reprimand.
- 39 Implicit in Dr. Yashon's argument is the admission that he would not have objected to Dr. Carey's testifying as to the matters actually testified to by the thirteen witnesses. The Court fails to see how Dr. Yashon could be prejudiced by being confronted by the testimony of the witnesses themselves as opposed to the hearsay testimony that Dr. Carey would have presented. The separate



question of whether Dr. Yashon was prejudiced by his inability to prepare for adequate cross-examination or to present rebuttal testimony will be examined as part of the due process analysis.

- 40 The Court believes that the standard promulgated by the Fifth Circuit in Sosa, supra, and cited approvingly in Woodbury, supra, and Laje, supra, is appropriate when a physician has a liberty or property interest in being a member of the medical staff of a particular hospital. To the extent that the opinions in Sosa and Laje hold that a physician must be accorded the substantive and procedural protections of the due process clause despite the fact that the physician does not possess a liberty or property interest in being a member of a hospital's medical staff and absent any allegation that membership on the medical staff was denied for a constitutionally impermissible reason, the Court declines to follow them. As the Seventh Circuit ruled in Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1, 4 (7th Cir. 1974) [footnote omitted],

the right to procedural due process is applicable only to state action which impairs a person's interest in either liberty or property. Certainly the constitutional





right to "substantive" due process is no greater than the right to procedural due process. Accordingly, the absence of any claim by the plaintiff that an interest in liberty or property has been impaired is a fatal defect in her substantive due process argument.

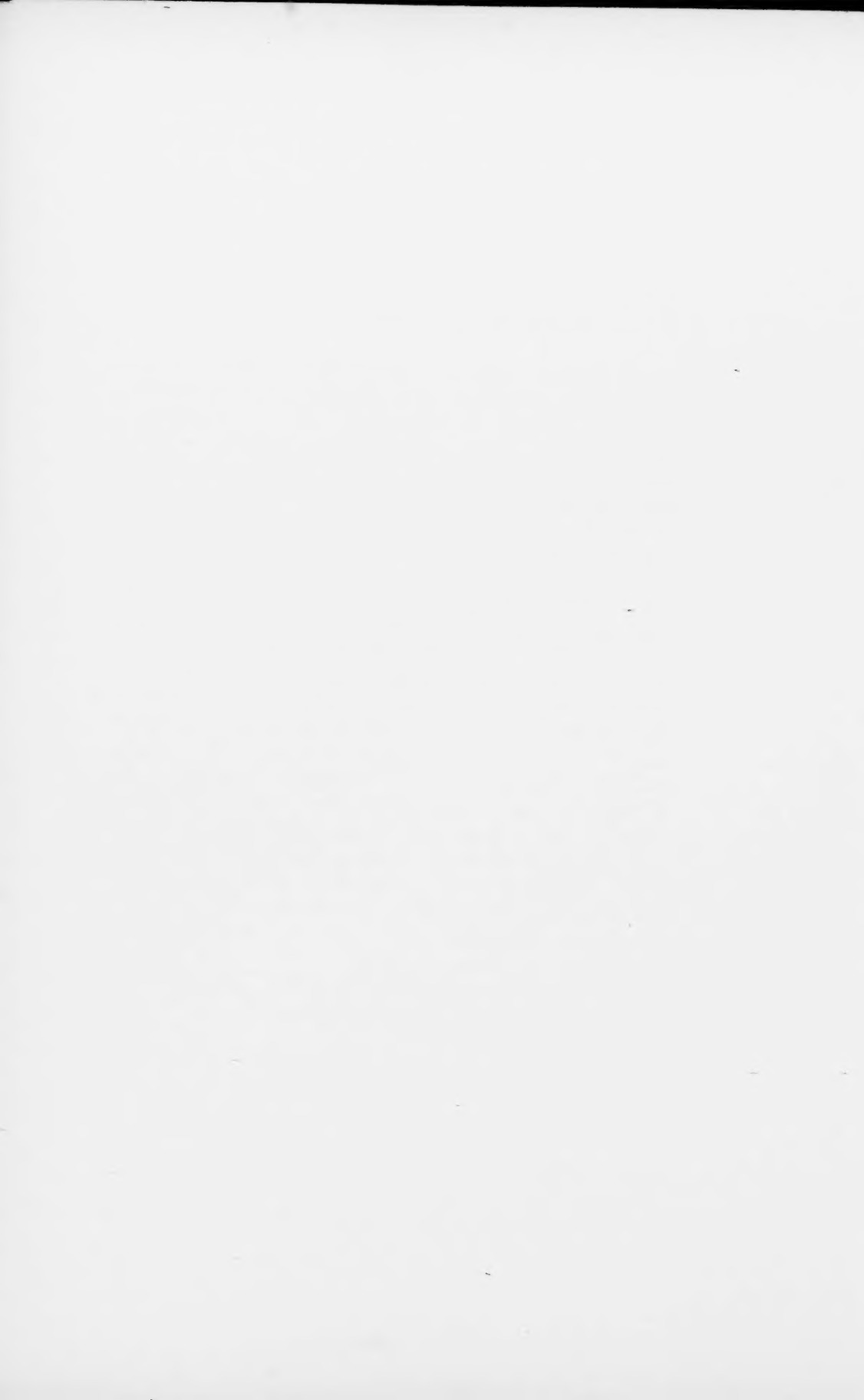
Accord, Sullivan v. Brown, 544 F.2d 279, 282 (6th Cir. 1976); Parham v. Hardaway, 555 F.2d 139 (6th Cir. 1977); Eichman v. Indiana State University Board of Trustees, 597 F.2d 1104, 1109 (7th Cir. 1979); Webster v. Redmond, 599 F.2d 793, 799-802 (7th Cir. 1979).

- 41 The Court does not believe that a teaching hospital such as University Hospitals is restricted to an examination of a physician's professional competence as a surgeon in deciding whether to grant medical staff privileges. Cf. Pollock v. Methodist Hospital, 392 F.Supp. 393, 397 (E.D. La. 1975).
- 42 Dr. Yashon cites only one specific instance of prejudice that resulted from his inability to conduct pre-hearing discovery. Plaintiff David Yashon, M.D.'s Memorandum in Opposition to Defendants' Motion to Vacate Consent Order and for Summary Judgment at 32. The Court notes, however, that none of the charges made by Dr. Carey involved



Dr. Yashon's professional competence in performing cerebral aneurysm surgery; the charge, rather, was that Dr. Yashon had orally falsified to Dr. Carey the results of his surgery.

- 43 The Court notes, however, that both the New Jersey and Hawaii decisions did not rest on federal constitutional law; rather, both cases involved the procedures mandated under state law as to appointments to the medical staffs of non-public hospitals.
- 44 Dr. Yashon's claim that he was denied the right to introduce documentary evidence is without merit except insofar as he is referring only to rebuttal documents. Dr. Whitcomb's letter to Dr. Yashon, ante at n. 20, made clear that Dr. Yashon would be given the opportunity to respond fully to each of the charges raised by Dr. Carey; this would include the right to present documentary evidence, a right that was utilized by Dr. Yashon as to a number of issues. See App. B for the compilation of documents submitted by Dr. Yashon at the hearing.
- 45 In fact, none of the cases cited by Dr. Yashon expressly holds that a physician is entitled, pursuant to the due process clause, to call witnesses on his own behalf in a proceeding held to consider his appointment or reappointment to the



medical staff, or his removal from the medical staff. Thus, a number of courts have held that the physician has the right to cross-examine adverse witnesses, to challenge the charges of misconduct, and to present evidence in his own behalf; they do not, however, amplify as to whether the right to present evidence includes the right to call witnesses. E.g., Poe v. Charlotte Memorial Hospital, 374 F.Supp. 1302, 1310-11 (W.D. N.Car. 1974); Christhilf v. The Annapolis Emergency Hospital Association, Inc., 496 F.2d at 178-79. Cf. Klinge v. Lutheran Charities Association of St. Louis, supra. Other courts have approved as constitutional proceedings in which no witnesses were called. E.g., Schlein v. The Milford Hospital, 423 F.Supp. 541, 543 (D. Conn. 1976); Stretten v. Wadsworth Veterans Hospital, 537 F.2d at 363; Woodbury v. McKinnon, 447 F.2d at 844. The other cases cited by Dr. Yashon are not on point; two of the cases involve procedural protections afforded a physician under state law, while the third, Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972), involved the procedural rights that must be afforded a parolee before his parole could be revoked.

- 46 Both of the cases cited by Dr. Yashon, Schulman v. Washington Hospital Center, supra, and Gotsis v. Lorain Community Hospital,



supra, involved the procedures employed by private hospitals in appointing physicians to their medical staffs; accordingly, these cases did not involve constitutional claims. In that there are no pendent state law claims before the Court, the Court will not render any opinion as to whether University Hospitals is bound under state law to comply with its bylaws and, if so, what is the appropriate relief for a physician whose application for reappointment is denied pursuant to procedures that fail to comply with the hospital's bylaws. See Lombardo v. Meachum, 548 F.2d 13, 16-17 (1st. Cir. 1977).

- 47 As previously explained, ante at n. 36 and accompanying text, the constitution, bylaws, rules and regulations are no longer in effect; to date, a new constitution and bylaws for the medical staff has not been approved. Accord, App. A at 374-75.





UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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No. 85-4027

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DAVID YASHON, M.D., et al.,  
Plaintiffs-Appellants,  
v.  
WILLIAM E. HUNT, M.D., et al.,  
Defendants-Appellees.

Before: KENNEDY and MILBURN, Circuit  
Judges; and CONTIE, Senior  
Circuit Judge.

J U D G M E N T

(Filed August 3, 1987)

ON APPEAL from the United States  
District Court for the Southern  
District of Ohio.

THIS CAUSE came on to be heard on  
the record from the said district court  
and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now  
here ordered and adjudged by this court  
that the judgment of the said district  
court in this case be and the same is  
hereby affirmed.



IT IS FURTHER ORDERED that  
Defendants-Appellees recover from  
Plaintiffs-Appellants the costs on  
appeal, as itemized below, and that  
execution therefor issue out of said  
district court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman  
Clerk



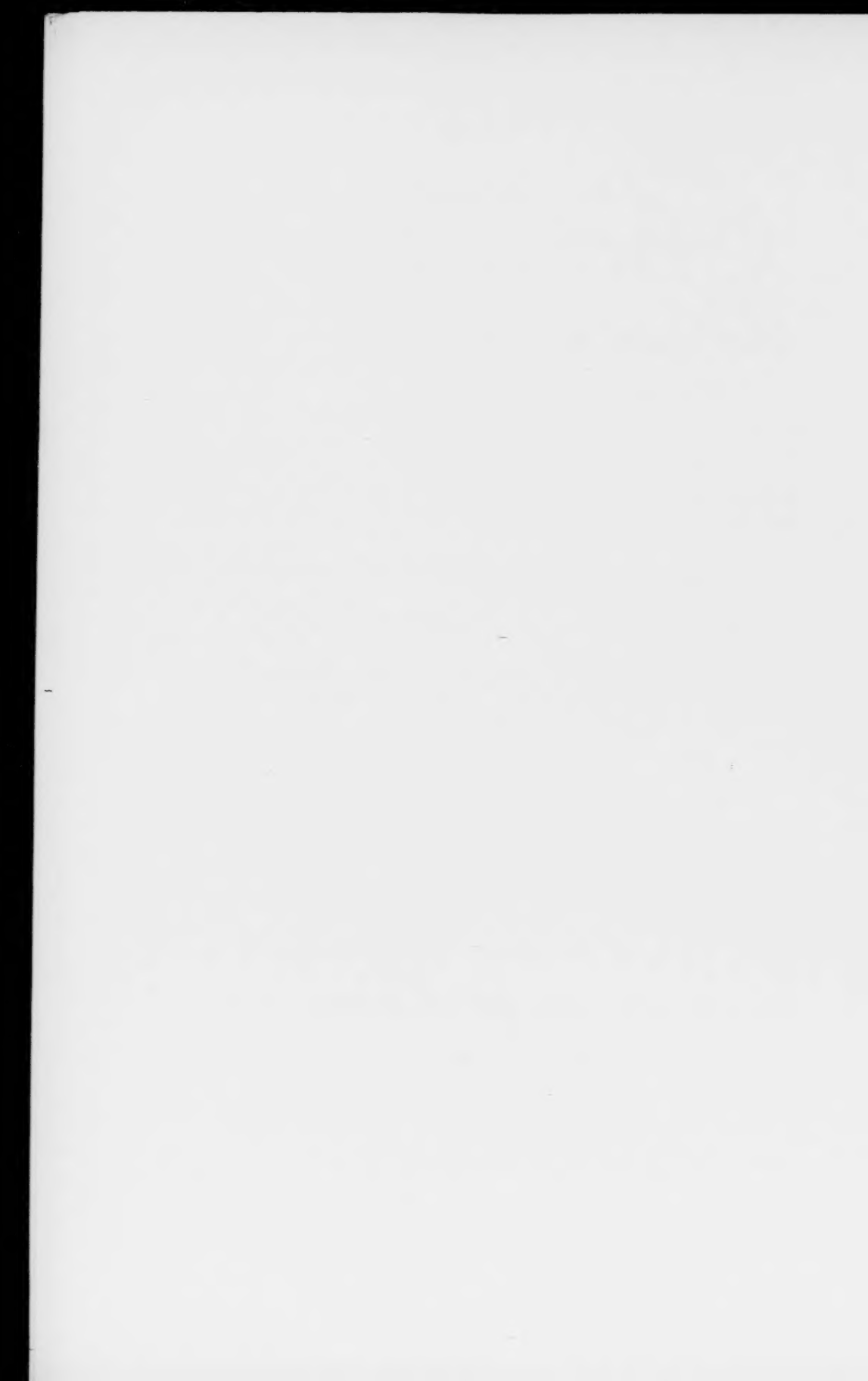
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

DAVID YASHON, M.D., ET AL.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	O R D E R
	)	
WILLIAM E. HUNT, M.D.,	)	
ET AL.,	)	
	)	
Defendants-Appellees	)	

(Filed September 22, 1987)

Before: KENNEDY and MILBURN, Circuit  
Judges and CONTIE, Senior  
Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the



petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John Hehman  
Clerk



MAY 10 1988

JOSEPH E. SPANIOLO, JR.  
CLERK

**In the  
Supreme Court of the United States**

**October Term, 1987**

**DAVID YASHON, M.D.,**  
*Petitioner,*

**v.**

**WILLIAM E. HUNT, M.D., et al.,**  
*Respondents.*

**BRIEF OPPOSING PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SIXTH CIRCUIT**

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No. 87-1507

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**In the  
Supreme Court of the United States**

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**October Term, 1987**

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DAVID YASHON, M.D.,  
*Petitioner,*

v.

WILLIAM E. HUNT, M.D., *et al.*,  
*Respondents.*

---

**BRIEF OPPOSING PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SIXTH CIRCUIT**

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**STATEMENT OF THE CASE**

Petitioner's Statement of the Case significantly misstates the facts of this case as the record before the lower courts reveals. Petitioner is a doctor of medicine duly licensed to practice by the State of Ohio. Since September, 1969 and continuing till the present time petitioner has served as an associate professor in the Department of Surgery of the Ohio State University. From September, 1969 until September 1, 1981, petitioner also was a member of the medical staff of the Ohio State University Hospitals (hereinafter "University Hospitals").

Medical staff privileges at University Hospitals are valid for only one year. Each medical staff member is

required to annually submit an application for reappointment to the medical staff. The Medical Staff Administrative Committee (hereafter "MSAC"), which is the body charged with responsibility for judging the fitness of physicians to serve on staff, determines whether applications for reappointment should be approved.

In 1981, prior to the expiration of petitioner's annual staff privileges, Dr. Larry C. Carey, who was Chairman of the Department of Surgery and petitioner's superior, declined to recommend petitioner's reappointment to the medical staff. Thereafter, the MSAC met on June 10, 1981, and the Executive Committee met on June 17, 1981, to consider the annual reappointment of petitioner. Both committees declined to reappoint petitioner.

On July 15, 1981, petitioner filed the instant action to force the respondents to approve his application. On July 17, 1981, the parties agreed that the MSAC should conduct a review of petitioner's application in which presentations could be made concerning the reasons for not recommending petitioner's reappointment. The district court did not order that the MSAC conduct a "due process" hearing, but the court did suggest that Dr. Carey and the petitioner each make a presentation to the MSAC.

Petitioner subsequently received two written notices of the hearing. Accompanying one of the notices was a list of the specific reasons being advanced for not approving petitioner's application.

On September 1, 1981, the MSAC hearing was held. Dr. Carey gave an opening statement explaining that he was going to present witnesses and evidence showing why petitioner should not be reappointed to the medical staff. Petitioner also made an opening statement to the MSAC.

Petitioner did not ask for an opportunity to present any witnesses.

During the course of the hearing both Dr. Carey and petitioner presented documentary evidence in support of their respective positions. Petitioner, in fact, read at length from documents and circulated others. The documents submitted by Dr. Carey were of no surprise to petitioner because the same documents had been submitted in a prior disciplinary hearing.

Dr. Carey also presented thirteen witnesses at the hearing. Petitioner was afforded the opportunity to cross-examine each of those witnesses and he did in fact extensively question those witnesses. Moreover, in this relatively informal proceeding, the members of the MSAC asked questions of the witnesses.

During the hearing petitioner admitted the truth of four charges against him. No additional witnesses were needed on those charges. Moreover, on four other charges every available witness who could testify in fact did testify at the hearing. Finally, at no time during or since the hearing did petitioner ever identify a single witness whom he would have called at the hearing on any issue.

The entire proceeding was taken down by a court reporter. At the end of the proceeding, the members of the MSAC voted 13 to 4 to deny the petitioner's request for reappointment to medical staff privileges. Minutes of the hearing were prepared which showed that the MSAC rejected petitioner's request for reappointment.

During the course of the MSAC hearing, many reasons were discussed for denying petitioner's application, including the numerous disciplinary actions against him during the last few years he was on the medical staff. Petitioner's



brief is less than candid about those disciplinary actions, which were extensively discussed during portions of the MSAC hearing.

The MSAC discussed a May, 1978 action brought under the University's detenurization procedures because of petitioner's falsification of a research grant application. It is undisputed that petitioner did in fact falsify the application. The Dean of the College of Medicine concluded in that prior action that the charge was "serious" but that, *alone*, the falsification was not sufficient to justify *removal of tenure*.

In another disciplinary proceeding, a committee of four doctors reported on March 13, 1979 that petitioner's removal of a doctor's note from a patient's chart was "improper conduct." The same panel concluded that petitioner was derelict in his responsibilities to another patient and that he gave no adequate reason why he delayed in seeing this critically ill patient.

The next disciplinary action, instituted on October 27, 1979 by Dr. Larry C. Carey, is especially important, inasmuch as petitioner focuses in his petition on the discredited and overruled report of the "Grievance Committee," an intermediate reviewing body. In this disciplinary action, Dr. Carey requested *removal* in mid term (as opposed to non-renewal) of petitioner's staff privileges based on a number of specific incidents and petitioner's pattern of disruptive, uncooperative and unprofessional behavior.

The first body reviewing the charges, the Investigation Committee, found that the charges were "substantial" and that the incidents cited had disrupted medical care, administrative functions and resident education. The Committee

also opined "that the situation has been allowed to continue too long and that disciplinary action should be taken to prevent further disruption."

Thereafter, the Vice-Chairman of the Department of Surgery, conveyed the Investigation Committee's report to the Dean of the College of Medicine. The Vice-Chairman wrote:

[The] pattern of unethical, unprofessional and self-serving behavior is so consistent and repetitive over a long period of time that the odds of these being isolated incidents or mere coincidence is almost infinitesimal. It seems quite clear that on several documented occasions, Dr. Yashon has been willing to manipulate a patient's status or situation, sometimes jeopardizing his safety or well being, in an attempt to gain leverage to his own purposes or convenience.

The matter was then referred to the "Grievance Committee" which issued a report on July 24, 1980. *That report was specifically overruled by the Associate Dean of the College of Medicine, who issued a strong reprimand to Petitioner on September 30, 1980.*<sup>1</sup> The Grievance Committee's report was overruled because the committee refused to provide the Associate Dean with the factual basis for its conclusory opinions, the report revealed an ignorance of key facts, and the Grievance Committee failed to interview

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<sup>1</sup> Dr. Tzagournis' letter of reprimand states in part:

The preponderance of evidence indicates that your activities and professional conduct are considered to be disruptive to your clinical division and University Hospitals. Numerous incidents over several years caused considerable concern to members of the Medical Staff, the non-M.D. staff of University Hospitals, and the Administration. In fact, the training program in Neurosurgery was seriously jeopardized by some of these actions.

crucial witnesses, including many of the current and former residents in Neurosurgery. Many of these residents and former residents had asked to be removed from any association with petitioner because of serious concerns over the quality of his care of patients.

The Grievance Committee's report also misrepresented that the few residents it did interview had a favorable impression of petitioner. This conclusion ignored information from Dr. Richard Dewey, a former resident who was interviewed by the Grievance Committee. Dr. Dewey summarized the information he had given to the Grievance Committee in a letter which Dr. Carey read during the MSAC due process hearing:

I feel that Dr. David Yashon is a detriment to the division of neurological surgery at the Ohio State University and to the university itself. Dr. Yashon did not appear to be interested in the teaching program, was not interested in the development of his residents or in the promotion of the specialty of neurological surgery, as I observed. He seemed far more interested in how many patients he had and how many operations he performed. \* \* \*

Dr. Yashon taught us a great deal about covering our flanks from a medical-legal standpoint but little about the techniques of neurosurgery and the social and intellectual skills required of a neurosurgeon in an extremely complex field.

As noted by the district court, the MSAC appropriately voiced concern at the September 1, 1981 hearing over the apparent lack of evidence and inaccurate reporting of evidence by the Grievance Committee.

Petitioner appealed the Associate Dean's reprimand to the Executive Committee. After a hearing on his appeal

commenced, petitioner learned that the Executive Committee would consider the matter *de novo* and could potentially remove petitioner from the medical staff. With that potential result, petitioner refused to proceed, withdrew his appeal and allowed the strong reprimand to stand.

Petitioner's continuing unprofessional conduct resulted in a fourth disciplinary proceeding in May 1980. Dr. Carey suspended petitioner's admission and operating room privileges for failing to respond appropriately to a specific request of a resident that petitioner come to the hospital and attend a patient. That suspension was lifted on June 26, 1980 by the Dean of the College of Medicine.

In addition to reviewing the prior disciplinary proceedings, the MSAC hearing also addressed a number of other reasons for the denial of petitioner's application. These included petitioner's negative and abusive behavior, which resulted in neurosurgical residents requesting not to work with him; his unauthorized removal of confidential records; additional examples of his failure to supervise residents; his verbal falsification to his superiors of operative surgery results; his improper admission of patients; and other unacceptable behavior as set forth in the notice of the hearing.

Petitioner has also been less than honest about his purported devotion to teaching. It is undisputed that he has not been a faculty member in the Neurosurgery Residency Training Program at the Ohio State University Hospitals since May 14, 1979. On that date, petitioner agreed to withdraw from the clinical teaching faculty in order to avoid an evidentiary hearing scheduled before an independent panel of neurosurgeons to consider his qualifications. Thus, since May 14, 1979, petitioner voluntarily has not

"taught" residents in his clinical practice. Petitioner has studiously avoided presenting this fact to this Court.

Denial of reappointment to medical staff privileges did *not* significantly affect petitioner's income or ability to practice medicine. In fact, approximately two-thirds of petitioner's medical practice as of September 1, 1981 was conducted at another hospital.

Additionally, denial of reappointment to the medical staff did not affect petitioner's tenure as a professor in the College of Medicine or his ability to do research in the laboratory as a professor. These facts, combined with the fact that petitioner has not taught residents since he withdrew from the faculty of the Residency Training Program in 1979, make it difficult to accept petitioner's statement that his paramount interest in being reappointed was to continue his chosen career as a professor of neurological surgery.

## **REASONS FOR DENYING THE WRIT**

### **A. THE DECISION OF THE SIXTH CIRCUIT IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT**

#### **1. The Decision Below Followed This Court's Principles When It Reviewed The Parties' Interests To Determine What Process Was Due In This Case.**

Even a cursory reading of the decision of the Sixth Circuit Court of Appeals reveals that the decision is not in conflict with the decisions of this Court on the due process issue. The court of appeals' decision scrupulously follows the due process analysis set forth by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and recognizes that "the overall concept of due process of law is a flexible one, and

therefore the type of procedural protections required in a particular situation depends largely upon the circumstances of that situation. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).” The court of appeals correctly recognized that it must balance the private interest at stake, the risk of an erroneous deprivation of such interest and the government’s interest in order to determine the procedural protections required. The mere assertion by petitioner of conflict with Supreme Court precedent will not suffice to create such a conflict where none exists.<sup>2</sup>

The undisputed facts presented to the lower courts establish the limited nature of the petitioner’s interests. While petitioner argues that he was denied the right to pursue his chosen career, the lower courts correctly determined that his interest was much more limited. First, petitioner as of September 1, 1981 conducted approximately two-thirds of his medical practice at another hospital. Thus, denial of reappointment to the staff of University Hospitals did not deprive petitioner of his livelihood or ability to practice medicine since he had staff privileges at more than one hospital.

Second, petitioner was seeking *renewal* of staff privileges and he knew that he was not guaranteed those staff privileges. *Nonrenewal* of annual staff privileges is distinguishable from a disciplinary revocation of privileges during the effective term of those privileges.

Third, denial of reappointment to the medical staff did not affect petitioner’s tenure as a professor. The denial

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<sup>2</sup>Petitioner even “recognizes that the constitutional right to be heard in one’s defense does not in all cases mandate a formal adjudicatory hearing in which the parties may call witnesses to testify.” Petition, at 26-27.

also did not affect his ability to do research in the laboratory as a professor.

Finally, and perhaps most importantly for determining the scope of the interest asserted by petitioner, it is undisputed that petitioner had voluntarily withdrawn on May 14, 1979 from the faculty of the Residency Training Program and ceased teaching residents in the course of his clinical practice. Moreover, petitioner had not sought the privilege of teaching in the two years preceding the decision to not renew his staff privileges. Thus, the MSAC hearing at issue in this case had no impact on petitioner's interest in being a clinical professor of neurological surgery, since he had not taught residents since May 14, 1979.

The interests of University Hospitals on the other hand, were extremely important. In light of its responsibility to provide quality medical training and patient care, it sought to retain only competent and highly compatible physicians on its medical staff. The court of appeals recognized that University Hospitals had an important interest in quickly dealing with incompetence and debilitating frictions in order to ensure effective performance by physicians on the staff, whose tasks require a high degree of cooperation, concentration, creativity and the constant exercise of professional judgment.

The courts below properly weighed the interests of the parties when they determined whether the procedural protections accorded petitioner violated any federal rights and whether the MSAC was presented with substantial evidence to support its ultimate action.



## **2. Due Process Does Not Mandate That Applicant For Reappointment to a Medical Staff Be Permitted to Call Witnesses**

Petitioner admits that no decision of this Court has ever held that an applicant for reappointment to a medical staff must be allowed to call witnesses. Petitioner argues, instead, that the decision below violates principles set forth in this Court's decisions reviewing due process requirements.

Petitioner relies upon five cases for his position that he had the right to call witnesses in this proceeding. The decision of the court of appeals below is not in conflict with any of those decisions. Three of the decisions can only be read to indicate that due process does *not* require that petitioner be permitted to call witnesses. The remaining cases deal with termination of liberty interests resulting in imprisonment and are thus, clearly distinguishable.

Petitioner's contention that the decision of the court of appeals is in conflict with *Goss v. Lopez*, 419 U.S. 565 (1975), is incorrect. This Court held in *Goss* that due process requires with the suspension of a student for disciplinary reasons "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581. All that *Goss* required was an informal give-and-take between the student and the administrative body that would, at least, give the student the opportunity to characterize his conduct and put it in what he deemed the proper context. *Goss* does not hold that due process mandates an opportunity to call witnesses. In fact, *Goss* supports the decision of the court of appeals, which recognized that petitioner was afforded a meaningful opportunity to be heard.



Likewise, *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961), cannot possibly be read to support petitioner's position. This Court held in *McElroy* that the summary exclusion of a worker from the premises of a factory, without a hearing and without notice as to the specific grounds for the exclusion, did not violate due process. There is clearly no conflict between *McElroy* and the decision of the court of appeals in this case.

*Goldberg v. Kelley*, 397 U.S. 254 (1970), also does not support the petitioner's claim to a constitutional right to call witnesses. *Goldberg* was an "entitlement" case which involved the termination of public assistance to a welfare recipient, which provided the recipient with essential food, clothing, housing and medical care. The Court in *Goldberg* held that while a hearing was required, it need *not* take the form of a judicial or quasi-judicial trial. However, the *Goldberg* Court did require that the recipient be given the opportunity to *orally* present his own evidence and arguments and to confront adverse witnesses. The procedural requirements in *Goldberg* were a direct result of the significant property interest at stake and the devastating impact which the loss of welfare benefits would have on the recipient. As noted earlier, the petitioner's interest in this case is much more limited and the impact of non-renewal of staff privileges was minimal.

The final two cases which petitioner cites, *Morrissey v. Brewer*, 408 U.S. 571 (1972), and *Wolff v. McDonnell*, 418 U.S. 539 (1974), are clearly distinguishable from the present case. There is no conflict between the principles enunciated in those cases and the decision of the court of appeals in this case.

*Morrissey* was a habeas corpus proceeding arising out of a parole revocation. No hearing had been held in *Morrissey* before the plaintiff's parole was revoked and he was reincarcerated. This Court recognized the paramount interest in avoiding a termination of liberty and examined what process was required prior to revocation of parole. However, this Court also recognized that the overall concept of due process of law is a flexible one, and therefore, the type of procedural protections required in a particular situation depends upon the circumstances of that situation. 408 U.S. at 481. *Morrissey* did not hold, or even suggest, that in the present context the petitioner must be afforded an opportunity to call witnesses.

Similarly, *Wolff* involved a prison disciplinary proceeding. That proceeding substantially affected a prisoner's liberty interest by imposing a loss of good-time credits, which otherwise would have shortened the prisoner's incarceration. This Court again recognized that the circumstances of each situation must be examined to determine the procedural protections required. *Wolff* does not suggest that the present circumstances require that petitioner be allowed to call witnesses.

This Court has been careful to note that the type of proceeding in question is a critical factor in determining what procedures are required. By way of example, in *Board of Curators, Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978), this Court specifically drew the distinction between disciplinary proceedings and evaluations of academic suitability.

Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-

hearing requirement. . . . The decision to dismiss respondent . . . rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor . . . Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making.

*Id.*, at 89-90. Thus, this Court held that merely informing the student of problems which could result in dismissal, and a careful and deliberate decision regarding the dismissal meet minimal due process requirements in the academic dismissal situation. *Id.* at 85.

The present case involves a peer review proceeding. The review of petitioner's application for hospital staff privileges was an evaluation of cumulative information which resulted in a medical judgment of hospital officials that petitioner did not have the ability to perform adequately as a member of the medical staff of University Hospitals. Thus, this case is much more analagous to the facts of *Horowitz* than to the facts of *Morrissey* or *Wolff*. The extensive due process protections which were given the petitioner, *i.e.*, written notice, opportunity for confrontation and cross-examination of witnesses, and an opportunity to orally argue his own case, adequately meet the due process requirements which this Court has found appropriate in its prior cases.

### **3. Petition Should Be Denied Based Upon Lower Courts' Factual Finding That Petitioner Was Not Refused Right To Present Witnesses**

The lower courts specifically held that petitioner never requested permission to call his own witnesses and that there was no outright refusal by respondents to allow petitioner to call witnesses. Petitioner, however, continues to mischaracterize what occurred before the MSAC in an effort to gain the review of this Court.

The record is clear that petitioner was willing to allow the MSAC to review his application without the benefit of any witnesses. When he learned that the MSAC would be presented with live testimony, the petitioner never asked to call his own witnesses or to postpone the proceeding. Thus, the record before the lower courts revealed that the MSAC never denied petitioner the right to call additional witnesses. This factual finding presents a sufficient reason for this Court to deny the petition.<sup>3</sup> *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

### **4. This Court Has Not Held That Reasons For A Decision And Evidence Relied Upon Must Be Specified Each Time A Property Interest Is Affected**

Petitioner's reliance upon *Wolff v. McDonnell*, *supra*, and *Morrissey v. Brewer*, *supra*, in support of his position that respondents were required to render a written or oral decision specifying both the reasons for the decision and

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<sup>3</sup>Petitioner argues that this finding by both the lower courts is "clearly incorrect and misleading". The petitioner fails to cite to any place in the record where he specifically asked to call additional witnesses or asked for a continuance of the proceedings. Rather, petitioner wants this Court to presume that he would not have been afforded an opportunity to call witnesses if he had asked permission to do so.

the evidence supporting that decision is in error. As noted earlier, *Wolff* and *Morrissey* both involve loss of liberty due to incarceration. Accordingly, this Court recognized in those cases that while the full panoply of procedural protection was not mandated in those cases, the circumstances of parole revocation and prison disciplinary proceedings require formal written decisions. Those cases, however, do not hold that written or oral reasons for a decision are constitutionally mandated whenever property interests are affected by state action.

Clearly, a written decision is not constitutionally mandated in all proceedings. By way of example, juries, when they render general verdicts, do not explain the basis of the verdict. Also, when federal district judges dispose of a case without a trial, as in granting a motion to dismiss, Fed. R. Civ. P. 52 (a) excuses them from having to issue findings and conclusions.

The present case is clearly distinguishable from *Wolff* and *Morrissey*. The property interest which petitioner asserts in this case differs significantly from the liberty interests which this Court sought to protect in *Wolff* and *Morrissey*. That difference, standing alone, is sufficient to show the lack of conflict between the court of appeal's decision below and the prior decisions of this Court.

The procedural context of this case also differs from the circumstances in *Wolff* and *Morrissey*. In the instant case, the MSAC was performing a subjective peer evaluation to determine whether petitioner's application for staff privileges should be approved. *Wolff* and *Morrissey*, on the other hand, involved fact finding by quasi-judicial bodies in disciplinary type actions to determine if specific laws or regulations had been broken.

Moreover, several safeguards existed in this case which make a formal written decision unnecessary. First, the petitioner had been provided with a written list of reasons upon which Dr. Carey had based his refusal to recommend reappointment. This list was the basis for the MSAC hearing. Second, a 377 page transcript of the full proceedings before the MSAC was prepared by a court reporter, and documentary evidence was also part of the record.

After reviewing that transcript, both the district court and the court of appeals determined that the MSAC had only been presented with matters which were reasonably related to the operation of the hospital. The matters presented were the reasons which Dr. Carey had advanced as the basis for his refusal, as petitioner's supervisor, to recommend reappointment. The evidence presented to the MSAC showed petitioner was uncooperative, disruptive and that he had engaged in numerous unprofessional improprieties. At the time the MSAC voted to reject petitioner's application, there was nothing in the record before it which was not rationally related to the operation of University Hospitals.<sup>4</sup>

The duty to explain presupposes that the explanation is not obvious, where it is a statement of reasons is not required. An explanation of the basis for a decision is unnecessary where, as here, the reason may be fairly inferred from the transcript of the hearing.

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<sup>4</sup>Petitioner alleges that a statement of the reasons for the MSAC decision is necessary since there was no evidence presented on six charges. This is a bald misstatement of the facts. The district court noted that for the few charges on which witnesses did not appear, there was documentary evidence. This evidence was reviewed by both lower courts.

The numerous written charges reviewed by the MSAC and the fully documented proceedings before the MSAC constituted an adequate record to permit an effective review. The lower courts did not have to engage in speculation, as suggested in petitioner's brief, to find a sufficient and rational basis for the MSAC's decision. Accordingly, the petitioner has failed to set forth any circumstances which would indicate a conflict with this Court's prior decisions.

**B. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS**

The three appellate decisions which petitioner claims are in conflict with the Sixth Circuit's decision in this case do *not* hold that procedural due process requires that a physician be afforded the right to call witnesses on his own behalf. Petitioner's brief inexcusably misstates the actual holdings of those cases.

In *Lew v. Kona Hosp.*, 754 F.2d 1420 (9th Cir. 1985), a physician's staff privileges were terminated after the physician was given notice, a written statement of charges against him, and a hearing, wherein he was represented by counsel and allowed to call and cross-examine witnesses. The Ninth Circuit Court of Appeals held that under the existing circumstances, the physician "received more than the minimum requirements of due process." *Id.* at 1425. The court of appeals did *not* hold that minimum requirements of due process mandate that a physician has the right to call witnesses.

The second case relied upon by petitioner, *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974), did not even consider the issue of whether a



physician must be afforded the right to call witnesses at a hearing to determine termination of staff privileges. The only issue addressed in *Duffield* was the physician's claim that the district court had improperly denied his motion to amend the complaint to allege the disqualification of the committee which made the determination to revoke staff privileges. The Fourth Circuit Court of Appeals stated: "It is this claim of disqualification which is the single complaint of the appellant to be resolved on this appeal." *Id.* at 515. While the physician had been allowed to call witnesses at the termination hearing, the court of appeals did *not* hold that this was a due process requirement.

Finally, *Christhilf v. Annapolis Emergency Hosp. Ass'n, Inc.*, 496 F.2d 174 (4th Cir. 1974), does not hold that minimum due process requires that a doctor have the right to call witnesses on his own behalf. In *Christhilf*, a physician at a hearing to determine staff privileges was only allowed to admit or deny thirty-two prior incidents. He was not allowed to discuss the merits of those incidents. The Fourth Circuit Court of Appeals stated: "The fundamental question is whether the board denied [the physician] due process by ruling . . . that although it would consider the 32 infractions of the rules, it would not go back into those cases and determine whether or not they were proper or improper." *Id.* at 178.

The court of appeals held that the physician must be given an opportunity to be heard on those incidents which had not been the subject of previous hearings. In setting forth what minimum due process required, the court of appeals stated:

Administrative proceedings of this nature need not be conducted as full-blown trials . . . At the very least the



board should have considered, along with the documentary evidence of the incidents, the doctor's explanation in justification or mitigation of charges of wrong-doing that have never previously been the subject of a board hearing.

*Id.* at 179. Thus, the court of appeals felt that minimum due process requirements would have been satisfied if the board had simply allowed the doctor to give an oral explanation of these incidents. In the present case, petitioner was given a much more extensive opportunity to be heard.

Petitioner's contention that the decision of the court of appeals below is in conflict with the above-mentioned decisions is incorrect. Those cases simply indicate that a physician should have some opportunity to be heard and they do not address the issue advanced by petitioner in this action.

### **C. THE DECISION BELOW DOES NOT DECIDE AN IMPORTANT, BUT PREVIOUSLY UNSETTLED QUESTION OF FEDERAL LAW**

The applicability of principles of administrative res judicata in this case is a question of state law. *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Migra v. Warren City School Dist.*, 465 U.S. 75 (1984). Petitioner, in an attempt to bring this case under the provisions of Sup. Ct. R. 17.1(c), misleadingly implies that this issue is a question of federal law. Citing only federal case law, the petitioner urges this Court to decide the scope of the principle of res judicata which the State of Ohio should accord to decisions from its administrative bodies. This issue is one which is properly determined by reference to state law, as specifically noted by the district court.

In fact, the Supreme Court of Ohio has dealt with the related principles of res judicata and collateral estoppel, and those doctrines of preclusion are part of the substantive law of the State of Ohio. *See, e.g., Norwood v. McDonald*, 142 Ohio St. 299 (1943); *Trautwein v. Sorgenfrei*, 58 Ohio St.2d 493 (1979); *Hicks v. De La Cruz*, 52 Ohio St.2d 71 (1977). The district court in the present case specifically noted that its conclusion that the doctrine of res judicata did not preclude the MSAC from hearing certain charges was in accord with the law of the State of Ohio. Thus, this issue involves a matter of state substantive law and does not raise an issue of federal law for review by this Court.

Moreover, the facts of this case show that the courts of Ohio would not apply the legal principle of res judicata. First, there was no adequate opportunity to litigate the prior charges of misconduct made against petitioner. Second, the precise issue at the MSAC hearing had never been the subject of prior peer review proceedings. Finally, some of the charges brought against the petitioner were new and had never been the subject of any administrative proceeding. These factual determinations preclude an application of the doctrine of res judicata under Ohio law.

It is clear that the court of appeals did not decide an important question of federal law which had not been settled by this Court when it considered the application of the principle of res judicata. It is also clear that the factual circumstances of this case make the doctrine of res judicata inapplicable. Accordingly, this Court should not grant the petition for a writ of certiorari in order to determine this question of state law.

**D. THE DECISION BELOW DID NOT DEPART  
FROM THE ACCEPTED AND USUAL COURSE  
OF JUDICIAL PROCEEDINGS**

In a desperate attempt to continue this litigation, petitioner restates his prior positions and argues that this Court should invoke its power of supervision over the lower federal courts. As respondents have previously argued, the lower federal courts correctly reviewed this case and determined that petitioner was given adequate due process protections. When petitioner's rhetorical patina is stripped away, this case is reduced to a simple determination by the MSAC, after giving petitioner an extensive opportunity to be heard, that petitioner's application should be denied based on the evidence that petitioner was dishonest, unethical, uncooperative and a very disruptive member of the medical staff, who on several occasions had even jeopardized patient care.

The lower courts carefully reviewed the procedural rights accorded petitioner, the complete transcript and the documentary evidence. The lower courts properly concluded that petitioner had been given at least the minimum rights required by due process. Nothing in the record of this case indicates that the lower courts departed from the accepted and usual course of judicial proceedings. Accordingly, this Court should not invoke its power of supervision over the lower federal courts as a basis for granting the petition for a writ of certiorari.

## CONCLUSION

Petitioner has failed to show any conflict between the decision of the Sixth Circuit Court of Appeals and prior decisions of this Court or of other courts of appeals. Petitioner has also failed to show any other basis for this Court to hear this case. Accordingly, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, John C. Elam, a member of the Bar of this Court and counsel for respondents herein, hereby certify that on the 10th day of May, 1988, three copies of the Brief Opposing the Petition for Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit were served, postage prepaid, upon Thomas A. Young, Esq., Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, Ohio 43215.

JOHN C. ELAM

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## APPENDIX

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Federal Rule Of Civil Procedure 52(a)

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

U.S. Supreme Court Rule 17.1(c)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

\* \* \*

(c) When a state court or a federal court of appeals has decided an important question of federal



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law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

